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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 191 .

No.

F. DREW CAMINETTI, PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 & 2 In the District Court of the United States in and for the Northern District of California, First Division.

(Indictment.)

At a stated term of said Court begun and holden at the City and County of San Francisco, within and for the Northern District of California, on the first Monday of March, in the year of our Lord One thousand nine hundred and thirteen.

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: That F. Drew Caminetti, hereinafter called the defendant, heretofore, to wit, on the fifteenth day of January in the year of our Lord One thousand nine hundred and thirteen, at Sacramento, in the State and Northern District of California then and there being, did then and there wilfully, knowingly and feloniously, unlawfully transport and cause to be transported, and aid and assist in obtaining transportation for, and in transporting in interstate commerce from Sacramento in the State and Northern District of California, to Reno in the State of Nevada, over the line of railroad of the Southern Pacific Company, a certain girl, to wit, one Lola Norris, for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant;

Violation Act June 25, 1910, White Slave Traffic Act.

That the Southern Pacific Company is and was, as defendant then and there well knew, a common carrier engaged in the business of transporting and carrying
3 passengers in interstate commerce, to wit, from the State of California to the State of Nevada, and did act in such capacity in bringing said Lola Norris from the State of California to the State of Nevada;

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

Second Count.

And the Grand Jurors aforesaid on their oaths aforesaid, do further present: That F. Drew Caminetti, hereinafter called the defendant, heretofore, to wit, on the fifteenth day of January in the year of our Lord One thousand nine hundred and thirteen, at Sacramento, in the State and Northern District of California then and there being, did then and there wilfully, knowingly and feloniously, unlawfully transport and cause to be transported, and aid and assist in obtaining transportation for, and in transporting in interstate commerce from Sacramento in the State and Northern District of California to Reno in the State of Nevada, over the line of railroad

of the Southern Pacific Company, a certain girl, to wit, one Marsha Warrington, for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and the mistress of one Maury I. Diggs;

That the Southern Pacific Company is and was, as defendant then and there well knew, a common carrier engaged in the business of transporting and carrying passengers in interstate commerce, to wit, from the State of California to the State of Nevada, and did act in such capacity in bringing said Marsha Warrington from the State of California to the State of Nevada;

4 Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

Third Count.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that F. Drew Caminetti, hereinafter called the defendant, heretofore, to wit, on the fifteenth day of January in the year of our Lord One thousand nine hundred and thirteen, at Sacramento, in the State and Northern District of California then and there being, did then and there wilfully, unlawfully and feloniously, knowingly persuade, induce and entice, and cause to be persuaded, induced and enticed, and aid and assist in persuading, inducing and enticing, a certain girl, to wit, one Lola Norris, to go from the City of Sacramento in the State and Northern District of California, to Reno, in the State of Nevada, in interstate commerce, over the line of railroad of the Southern Pacific Company, for the purpose of debauchery and for an immoral purpose, to wit, that she, the said Lola Norris should be and become the concubine and mistress of the said defendant;

That the Southern Pacific Company is and was, as defendant then and there well knew, a common carrier engaged in the business of transporting and carrying passengers in interstate commerce, to wit, from the State of California to the State of Nevada, and did act in such capacity in bringing said girl Lola Norris from the State of California to the State of Nevada;

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United
5 & 6 States of America in such case made and provided.

Fourth Count.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That F. Drew Caminetti, hereinafter called the defendant, heretofore, to wit, on the fifteenth day of January in the year of our Lord One thousand nine hundred and thirteen, at Sacramento, in the State and Northern District of California then and there being, did then and there wilfully, unlawfully and feloniously, knowingly persuade, induce and entice, and cause to be persuaded, induced and enticed, and aid and assist in persuading, inducing and enticing, a certain girl, to wit, one Marsha Warrington, to go from

the City of Sacramento in the State and Northern District of California, to Reno in the State of Nevada, in interstate commerce, over the line of railroad of the Southern Pacific Company, for the purpose of debauchery and for an immoral purpose, to wit, that she, the said Marsha Warrington should be and become the concubine and the mistress of one Maury I. Diggs;

That the Southern Pacific Company is and was, as defendant then and there well knew, a common carrier engaged in the business of transporting and carrying passengers in interstate commerce, to wit, from the State of California to the State of Nevada, and did act in such capacity in bringing said Marsha Warrington from the State of California to the State of Nevada;

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

J. L. McNAB,
United States Attorney.

7 In the District Court of the United States in and for the Northern District of California, First Division.

THE UNITED STATES
vs.
F. DREW CAMINETTI, Defendant.

(*Demurrer.*)

Comes now the defendant in the above entitled action and proceeding, and demurs to the indictment on file herein, and for grounds of demurrer, alleges;

I.

That the first count of said Indictment does not state facts sufficient to constitute an offense against the United States of America.

II.

That the said first count of said Indictment does not state a public offense, or any offense.

III.

That the said first count of said indictment is uncertain because it does not appear therefrom or therein, nor can it be ascertained therefrom, what offense the said indictment charges, or attempts to charge.

IV.

That the defendant does now specify the following reasons wherein said first count of said indictment does not constitute an offense against the laws of the United States, and wherein said indictment is uncertain:

(a) That it does not appear, and cannot be ascertained
8 from said first count of said indictment, how, or in what manner, or by what means the said defendant transported, or caused to be transported, or aided or assisted in obtaining transportation for, or in transporting in interstate commerce, or at all, from Sacramento, in the State and Northern District of California, to Reno, in the State of Nevada, or elsewhere, over the lines of railroad of the Southern Pacific Company, a certain girl for the purposes of debauchery, or for an immoral purpose, or for any purpose, or with the intent that said girl should be or become the concubine or mistress of said defendant.

V.

That the said first count of said Indictment is ambiguous in each and every and all of the particulars wherein it is hereinabove alleged to be uncertain.

VI.

That the said first count of said Indictment is unintelligible for each, every and all of the particulars wherein it is hereinabove alleged to be uncertain.

VII.

Defendant herein demurs to the second count of said indictment for all of the reasons and grounds stated above with reference to the first count of the said Indictment.

VIII.

Defendant herein demurs to the third count of said Indictment for all of the reasons and grounds stated above with reference to the first count of the said Indictment; and also for the further reason and ground:—

(a) That it does not appear from said third count of said indictment how, or by what manner or means said defendant
9 knowingly persuaded, induced and enticed, or caused to be persuaded, induced and enticed, or aid- or assist- in persuading, inducing and enticing, a certain girl to go from the City of Sacramento, in the State and Northern District of California, to Reno, in the State of Nevada, or elsewhere, in interstate commerce, over the line of railroad of the Southern Pacific Company, for the purpose of debauchery, or for an immoral purpose, or at all, that she should be or become the concubine or mistress of F. Drew Caminetti, defendant.

IX.

Defendant herein demurs to the fourth count of said Indictment for all the reasons and grounds stated above with reference to the first count of said Indictment; and also for the further reason and ground:—

(a) That it does not appear from said fourth count of said Indictment how, or by what manner or means said defendant know-

ingly persuaded, induced and enticed, or caused to be persuaded, induced and enticed, or aid- or assist- in persuading, inducing and enticing, a certain girl to go from the City of Sacramento, in the State and Northern District of California, to Reno, in the State of Nevada, or elsewhere, in interstate commerce, over the line of railroad of the Southern Pacific Company, for the purpose of debauchery, or for an immoral purpose, or at all, that she should be or become the concubine or mistress of one Maury I. Diggs.

X.

That this Court has no jurisdiction of the person of the defendant or the subject matter contained in said Indictment or any of the counts thereof, nor of the offense, or any of the offenses, alleged to have been committed by said defendant.

10

XI.

That the Act under which said indictment purports to be framed, the Act of June 25th, 1910, known and referred to as the White Slavery Traffic Act, *in* unconstitutional and not authorized by any provisions of the constitution or its amendments.

XII.

That more than one offense is charged in said Indictment, and each and every county thereof.

Wherefore, defendant prays to be hence dismissed and his bondsman exonerated.

Dated July 30th, 1913.

NATHAN C. COGHLAN,
MARSHALL B. WOODWORTH.
DEVLIN & DEVLIN,
S. LUKE HOWE,
Attorneys for Defendant.

I hereby certify that the above demurrer is, in my opinion and believe, meritorious and well founded in law, and not interposed for the purpose of delay.

Dated July 30th, 1913.

NATHAN C. COGHLAN,
MARSHALL B. WOODWORTH,
DEVLIN & DEVLIN,
S. LUKE HOWE,
Attorney- for Defendant.

(Endorsed:) Filed Jul. 30 1913. W. B. Maling, Clerk, by Francis Krull, Deputy Clerk.

11–19 At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court room thereof, in the City and County of San Francisco, on Wednesday, the 30th day of July, in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable Wm. C. Van Fleet, Judge.

5278.

UNITED STATES
vs.
F. DREW CAMINETTI.

(*Minutes, Arraignment and Plea, etc.*)

The defendant being present in open court with his attorney, Marshall B. Woodworth, Esqr., on motion of Theodore J. Roche, Esqr., Special Counsel for the Government, said defendant was called for arraignment, and then and there duly arraigned upon the indictment herein against him. Mr. Woodworth interposed a motion to quash said indictment on behalf of defendant, and after hearing counsel, by the court ordered that said motion be, and the same is hereby denied. Mr. Woodworth then interposed a demurrer to said indictment, and after hearing counsel, by the court ordered that said demurrer be, and the same is hereby overruled, to all of which rulings the defendant then and there duly excepted. The said defendant then and there pleaded not guilty to said indictment, and by the court ordered that said plea be, and the same is hereby entered. Further ordered that this case be placed upon the calendar for Aug. 5, 1913, for trial to follow case # 5280.

20–29 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5278.

THE UNITED STATES OF AMERICA
vs.
F. DREW CAMINETTI.

(*Verdict.*)

We, the Jury, find F. Drew Caminetti, the defendant at the bar, Guilty on the first count of the Indictment, and not guilty on the 2nd, 3rd and 4th counts of the Indictment.

C. F. MICHAELS, *Foreman.*

(Endorsed:) Filed September 5th 1913, at 5 o'clock and 5 minutes P. M. W. B. Maling, Clerk.

30 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5278.

THE UNITED STATES
vs.
F. DREW CAMINETTI, Defendant.

Motion in Arrest of Judgment.

Now comes F. Drew Caminetti and hereby moves the above entitled Court for an order in arrest of judgment herein, upon the following grounds, to-wit:

I.

That the first count of the indictment does not state facts sufficient to constitute an offense against the United States.

II.

That the said first count of said indictment does not state a public, or any, offense.

III.

That the said first count of the indictment is uncertain because it does not appear therefrom or therein, nor can it be ascertained therefrom, what offense the said indictment charges or attempts to charge.

IV.

That the said first count of said indictment does not set forth an offense against the laws of the United States, and that it is uncertain in that it does not appear, and cannot be ascertained, from
31 said first count of said indictment, how, or in what manner, or by what means the said defendant transported or caused to be transported, or aided or assisted in obtaining transportation for, or in transporting in interstate commerce, or at all, from Sacramento, in the State and Northern District of California, to Reno, in the State of Nevada, or elsewhere, over the lines of railroad of the Southern Pacific Company a certain girl for the purpose of debauchery, or for an Immoral purpose, or for any purpose, or with the intent that said girl should be or become the concubine or mistress of said defendant.

V.

That the said first count of said indictment is ambiguous in each and every and all of the particulars wherein it is hereinabove alleged to be uncertain.

VI.

That the said first count of said indictment is unintelligible for each, every and all, of the particulars wherein it is hereinabove alleged to be uncertain.

VII.

That this court has no jurisdiction of the person of the defendant or the subject matter contained in said indictment or in any of the counts thereof, nor of the offense, or any of the offenses, alleged to have been committed by said defendant.

VIII.

That the act under which said indictment purports to be framed, the Act of June 25, 1910, known and referred to as the "White Slave Traffic Act" is unconstitutional and not authorized by any provisions of the Constitution or the amendments thereto.

IX.

That more than one offense is charged in said indictment,
32 and in each and every count thereof.

X.

That the evidence presented in the case does not constitute any violation of the "White Slave Traffic Act."

XI.

That the evidence presented, even assuming it to be true, and all that the prosecution claims for it, does not disclose any violation of the "White Slave Traffic Act," and that the facts presented in the case do not constitute any violation of the "White Slave Traffic Act."

XII.

That the facts proved do not constitute such an offense or offense as was intended by Congress to be prosecuted by virtue of the act known as the "White Slave Traffic Act," nor does the prevention and punishment of the acts proven fall within the scope of the purpose for which that act was intended and which the defendant is charged with having violated, and that there is no evidence to show that the defendant profited by or expected to or intended to profit in or share in any profit ensuing or arising in pursuance of the transportation set out in the indictment.

XIII.

That the offenses alleged in said indictment and proven in said case come solely within the police powers of the States of California and of Nevada and that the above entitled court cannot assume jurisdiction thereof without violating Article 10 of the Amendments to the Constitution of the United States.

In support of said motion in arrest of judgment, the defendant hereby refers to and makes a part hereof all of the records,
33–42 evidence and proceedings in the above entitled case.

Wherefore said defendant prays that said motion for an order in arrest of judgment be granted.

MARSHALL B. WOODWORTH,
ROBT. T. DEVLIN,
NATHAN C. COGHLAN,
Attorneys for Defendant.

Service admitted this 17th day of Sept., 1913.

SULLIVAN & ROCHE,
Assistants to Att'y Gen'l of U. S.

(Endorsed:) Filed Sept. 17, 1913. W. B. Maling, Clerk, by Francis Krull, Deputy Clerk.

43 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5278.

THE UNITED STATES
vs.
F. DREW CAMINETTI, Defendant.

Petition for Writ of Error.

F. Drew Caminetti, the defendant in the above entitled cause, feeling himself aggrieved by the judgment of the above entitled court, entered upon the 17th day of September, 1913, whereby it was adjudged that the defendant be confined in the Federal Penitentiary at McNeil's Island, State of Washington, for the term of eighteen months, and that he be fined the sum of $1,500.00, and be imprisoned until the fine is paid or until he is otherwise discharged, now comes through his attorneys and petitions said Court for an order allowing him, the said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; and that all further proceedings in this Court be suspended, stayed and superseded until the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

And your Petitioner will ever pray, etc.

Dated: December 24, 1913.

MARSHALL B. WOODWORTH,
ROBERT T. DEVLIN,
NATHAN C. COGHLAN,
S. LUKE HOWE,
A. CAMINETTI, JR.,
Attorneys for Defendant.

44 Service of within Petition for Writ of Error admitted this 24th day of December, 1913.

——— ———.

(Endorsed:) Filed December 24th, 1913. Walter B. Maling, Clerk.

45 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5278.

THE UNITED STATES OF AMERICA
vs.
F. DREW CAMINETTI, Defendant.

Assignment of Errors.

Now comes the defendant in the above entitled cause, by Marshall B. Woodworth, Esq., one of his attorneys, and specifies the following as the errors upon which he will rely and which he will urge upon his writ of error in the above entitled cause, to-wit:

I.

The Court erred in overruling the demurrer interposed to the indictment, to which ruling the defendant then and there duly and regularly excepted.

II.

The Court erred in overruling the motion in arrest of judgment interposed on behalf of the defendant, to which ruling the defendant then and there duly and regularly excepted.

III.

The Court erred in holding that the first count of the indictment stated facts sufficient to constitute an offense against the United States, to which ruling the defendant then and there duly and regularly excepted.

IV.

The Court erred in holding that the first count of the indictment stated a public, or any offense, to which ruling the defendant
46 then and there duly and regularly excepted.

V.

The Court erred in not holding that the first count of the indictment is uncertain because it does not appear therefrom or therein, nor can it be ascertained therefrom, what offense the said indictment charges or attempts to charge, to which ruling the defendant then and there duly and regularly excepted.

VI.

The Court erred in not holding that the first count of said indictment does not set forth an offense against the laws of the United States, and that it is uncertain in that it does not appear, and cannot be ascertained, from said first count of said indictment, how, or in what manner, or by what means the said defendant transported or caused to be transported, or aided or assisted in obtaining transportation for, or in transporting in interstate commerce, or at all, from Sacramento, in the State and Northern District of California, to Reno, in the State of Nevada, or elsewhere, over the lines of railroad of the Southern Pacific Company, a certain girl for the purpose of debauchery, or for an immoral purpose, or for any purpose, or with the intent that said girl should be or become the concubine or mistress of said defendant, to which ruling the defendant then and there duly and regularly excepted.

VII.

The Court erred in not holding that the first count of said indictment is ambiguous in each and every and all of the particulars wherein it was alleged in said demurrer to be uncertain, to which ruling the defendant then and there duly and regularly excepted.

VIII.

The Court erred in not holding that the first count of said indictment is unintelligible for each, every and all, of the par-
47 ticulars wherein it was alleged in said demurrer to be uncertain, to which ruling the defendant then and there duly and regularly excepted.

IX.

The Court erred in holding that it had jurisdiction of the person of the defendant or the subject matter contained in said indictment or in any of the counts thereof, or of the offense, or any of the offenses, alleged to have been committed by said defendant, to which ruling the defendant then and there duly and regularly excepted.

X.

The Court erred in not holding that the act under which said indictment purports to be framed, the Act of June 25, 1910, known and referred to as the "White Slave Traffic Act" is unconstitutional and not authorized by any provisions of the Constitution or the amendments thereto, to which ruling the defendant then and there duly and regularly excepted.

XI.

The Court erred in not holding that more than one offense is charged in said indictment, and in each and every count thereof, to which ruling the defendant then and there duly and regularly excepted.

XII.

The Court erred in holding that the evidence presented in the case constituted violation of the "White Slave Traffic Act," to which ruling the defendant then and there duly and regularly excepted.

XIII.

The Court erred in not holding that the evidence presented, even assuming it to be true, and all that the prosecution claims for it, does not disclose any violation of the "White Slave Traffic Act," and that the facts presented in the case do not constitute any
48–126 violation of the "White Slave Traffic Act,"to which ruling the defendant then and there duly and regularly excepted.

XIV.

The Court erred in not holding that the facts proved do not constitute such an offense or offenses as was intended by Congress to be prosecuted by virtue of the act known as the "White Slave Traffic Act," nor does the prevention and punishment of the acts proven fall within the scope of the purpose for which that act was intended and which the defendant is charged with having violated, in that there is no evidence to show that the defendant profited by or expected to or intended to profit in or share in any profit ensuing or arising in pursuance of the transportation set out in the indictment, to which ruling the defendant then and there duly and regularly excepted.

XV.

The Court erred in not holding that the offenses alleged in said indictment and proven in said case come solely within the police powers of the States of California and of Nevada and that the District Court of the United States in and for the Northern District of California, First Division, cannot assume jurisdiction thereof without violating Article 10 of the Amendments to the Constitution of the United States, to which ruling the defendant then and there duly and regularly excepted.

XVI.

The Court erred in not granting the motion made on behalf of defendant to transfer the trial of the case to Sacramento, California, to which ruling the defendant then and there duly and regularly excepted.

XVII.

The Court erred in not granting the motion made on behalf of the defendant to instruct the jury to acquit, to which ruling the defendant then and there duly and regularly excepted.

* * * * * * *

127-131 CCVII.

The Court erred in charging the jury as follows: "And if he had failed to deny or explain acts of an incriminating nature, that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence," to which charge as given, the defendant then and there duly and regularly excepted.

* * * * * * *

132 (Copy.)

(Writ of Error.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for the Northern District of California before you, or some of you, between F. Drew Caminetti, Plaintiff in Error, and The United States of America, Defendant in Error, a manifest error hath happened to the great damage of the said F. Drew Caminetti, Plaintiff in Error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief
133 Justice of the United States, the 16" day of March, in the year of our Lord One Thousand, Nine Hundred and Fourteen.

[SEAL.] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By MEREDITH SAWYER,
Deputy Clerk.

Allowed by
WM. C. VAN FLEET,
U. S. Dist. Judge.

Service by copy admitted this 16th day of March, 1914.

MATT. I. SULLIVAN,
THEO. J. ROCHE,
Assistants to Att'y Gen'l of U. S.

(Endorsed:) Filed Mar. 16, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

134 (Copy.)

(*Citation on Writ of Error.*)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, 1st Division, wherein F. Drew Caminetti, is Plaintiff in Error, and you are defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. C. Van Fleet, United States District Judge for the Northern District of California, this 16" day of March, A. D. 1914.

WM. C. VAN FLEET,
United States District Judge.

135–308 UNITED STATES OF AMERICA, *ss:*

On this 16" day of March, in the year of our Lord one thousand, nine hundred and fourteen, personally appeared before me F. D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the subscriber, Marshall B. Woodworth, and makes oath that he delivered a true copy of the within citation to Messrs. Matt I. Sullivan and Theodore J. Roche, Special Assistant Attorneys General.

MARSHALL B. WOODWORTH.

Subscribed and sworn to before me at San Francisco, California, this 16" day of March, A. D. 1914.

[SEAL.] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Service by copy admitted this 16th day of March, 1914.
MATT I. SULLIVAN,
THEO. J. ROCHE,
Assistants to Att'y Gen'l of U. S.

(Endorsed:) Filed Mar. 16, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

* * * * * * *

309 On cross examination, the witness Lola Norris stated as follows:

* * * * * * *

Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did pro-
310–401 pose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody

* * * * * * *

402 Thereupon F. DREW CAMINETTI, the defendant, was called as a witness on his behalf, and, after being duly sworn, testified on direct examination as follows:

My name is F. Drew Caminetti. I remember having a conversation with Miss Marsha Warrington during the latter part of February, 1913, on "P" Stre-t in the City of Sacramento, with reference to a publication in the "Sacramento Bee." She told me that a Reporter on the "Sacramento Bee," a Mr. Putnam, who I believe is the sporting editor of the "Bee" had told her that another Reporter had discovered that she and Lola Norris, Mr. Diggs and I were going around together and that he had written an article about it; that her friend Mr. Putnam had used his influence and had the article suppressed; I asked her if she had acknowledged the fact to him and she said that she had. That was the first time I had heard anything about a publication in the "Bee." In the latter part of February, 1913, I had a conversation with Mr. O'Brien relative to a statement made by Miss Warrington's uncle, in which possible harm to me that might ensue was discussed. Mr. O'Brien told me that one afternoon Miss Warrington's uncle, a man by the name of Baumgarten, I believe, had come in to his place of business and inquired of Monte Austin, in his presence, if he knew that Marsha Warrington was going with Mr. Diggs, and Mr. O'Brien told me that Mr. Austin replied that he did not know for a fact that Miss Warrington was going with Mr. Diggs; Miss Warrington's uncle then con-
403 tinued and said that if Mr. Warrington found out for a fact that Miss Warrington was going with any married man, that

he would kill him, and that if he found them together he would kill both of them. I believed that statement. I had a conversation with the same gentleman, Mr. O'Brien, at the Columbia Hotel, on March 3rd, 1913, relative to threats made by Mr. Diggs, Sr. I had two conversations with Mr. O'Brien on March 3rd relative to remarks made by Mr. Diggs, Sr. The first one was at Mr. O'Brien's place of business, during my lunch hour, about 12-30. At that conversation, Mr. O'Brien and I were together, were alone, I should say, and afterwards we went over to the Columbia Hotel where Mr. Diggs was and went over the convecsation again. He told me—he called me up at my office first and told me that he wanted to see me. So I went up there. He told me that Mr. Diggs had come into the saloon looking for Maury and me, and that he had some policemen with him; he came in and said "Do you know where Maury is" to Mr. O'Brien; Mr. O'Brien replied "No sir." He said "I think you are a damned liar." Mr. O'Brien said he didn't know where he -as. Thereupon Mr. Diggs got very angry and excited and acted like a maniac and pounded the bar with his fist. He said that there were a bunch of people in Sacramento who were ruining his son, mentioning two girls and me, and that he intended to put a stop to it if he had to have everybody arrested, that if any other person sold any liquor to Mr. Diggs he would have them arrested. That he was not going to stand having his son ruined by people who were exerting an evil influence on him as he thought. I believed that statement when it was told to me by Mr. O'Brien. Mr. O'Brien told me that there was a policeman in front of his place of business and for me to come in the back way. After that I went to the Columbia Hotel, and there had a conversation with Mr. O'Brien, in the presence of Maury I. Diggs. When I refer to Mr. Diggs as having been the party at the saloon, I mentioned Mr. I. P. Diggs, I believe at the Columbia Hotel Mr. O'Brien repeated for Mr. Diggs's bene-
404 fit,—Mr. Maury I. Diggs—what he had told me at the saloon, and we simply added a few comments of our- to it as to the lik-lihood of whether his father would do it or not. On Monday, March 3, 1913, I had a conversation with Mr. I. P. Diggs, the father of Maury I. Diggs, over the telephone. I was in the office in the State Capitol at that time. In the office of the State Board of Control. The phone bell rang. We had a buzzer system in the office there; there were 5 or 6 extensions and my signal on the buzzer rang and I answered the phone. The gentleman on the other end said "Hello, is this Mr. Caminetti?" Do you want it verbatim or in substance? I can give it almost verbatim. "Is this Mr. Caminetti?, and I said it was. "This is Mr. I. P. Diggs of Berkeley, do you know me?" "No sir." "Do you know Maury Diggs?" "Yes sir." "I am Maury Diggs's father, do you know me?" I said "How do you do, Mr. Diggs." He said "I came up here to see Maury, can you tell me where he is?" I said "No sir;" he said "Well, I have reason to believe that you can." I said "You are mistaken;" he said "Well, I came up here from Berkeley to get him, and I am going to get you too, I find that you boys are running around with two girls here and have been acting in a way that married men

should not, that you are no fit man to work on the Board of Control, and I am going to let them know it; you are carousing and running around the country and not staying at home and not attending to your business, you are not a fit man to work there and I am going to take steps to see that they find out about it." There were five or six extensions, as I say, and I didn't want the members of the Board of Control to hear that, and I said "You had better see me personally and say that to my face." He must have taken that as a threat because he said, "Yes, God damn you, I will tell it to your face and I will tell it to others too," and he hung up the telephone. During that conversation Mr. Ford and Mr. Avery were in the office. I believe it was about 11 o'clock in the morning. I remember seeing Mr. Lasley, the uncle of Mr. Maury I. Diggs, on Monday evening, March 3rd. I had a conversation with him at that time. It
405 took place in Mr. O'Brien's establishment. Mr. Lasley told me that he had seen Mr. Diggs that afternoon, that he was around town acting like a wild man, that he had policeman with him, that he had telephoned all around the country, to all the surrounding towns, mentioning particularly, I remember, Placerville and Stockton, and had notified the police in those towns that if they got hold of Maury Diggs to arrest him and hold him. He also told me that Mr. Diggs had made up his mind to have the two girls and myself and Maury arrested, that he was going to put Maury and me on probation. The two girls that Mr. Lasley referred to were Miss Warrington and Miss Norris. I know Mrs. Maury I. Diggs. I remember Mrs. Diggs' calling me up over the telephone on Wednesday, March 5, 1913. I was in Mr. O'Brien's place, at a little after 5 o'clock. I was called to the phone and a voice which I recognized as belonging to Mrs. Diggs said, "Mr. Caminetti, for a long time you have been a snake to me, now I am going to show you what a real serpent is; I know that you and Maury have been going around with two girls, Marsha Warrington and Lola Norris, and I know the name *who* have been going under—Mr. Whitman; I am going to tell these girls' parents and you know what will happen to you." I had been trying to interrupt her as soon as I got the drift of what she was saying but I could not; at that point, however, I succeeded, and I tried to point out to her that she should not do anything like that, that if she took a hasty action like that at that time, that later on she might repent it. I could not succeed in getting her to see anything of that kind. I finally succeeded in getting her to promise me that she would take no step in the matter until after I had a chance to talk to her in the matter; she said if I came out soon enough she would not do anything until she would see me. So I made an engagement for 7-30 that evening and I went out there. When I got in the house, after she let me in, she repeated the remarks that she had made to me over the phone and then went deeper into it. She told me of several trips that Mr. Diggs and
406 Marsha and Lola—Miss Warrington and Lola Norris and I had taken. She told me the things she had suffered through the fact that we had been going with these girls. She depicted to me the suffering my wife probably went through because we went

with these girls, and told me that she was going to tell these girls' parents—she repeated that again—as the only way in which to break this up; that if she did that that I knew what would happen to me, that that would put an end to it all, that Mr. Warrington would probably shoot. I tried to persuade her out of that, at least I tried to dissuade her from seeing the girls' parents, but I could not succeed in getting that promise from her. About 8 o'clock Mr. Maury Diggs and Mr. Laslie came in and that put an end to the conversation; upon their entrance I got up and left the house and went down town. At that time I believed she would carry into execution the threats that she made. I believed what she said to me. I knew that she had the facts, had found out the facts in the case. Mrs. Diggs had been greatly worried. She acted that evening as if she was capable of going to any length at all; she was very nervous and very excited. She had not had any sleep, she told me, during that week. That was the week when Mr. Diggs was hiding from his father. She told me she had not had any sleep, she was half crazy and she intended to make me and these two girls suffer everything that she had suffered. I remember having been at the Peerless Restaurant on Saturday afternoon, March 8, 1913. I saw Maury I. Diggs there at that time. There were different people there at different times. Miss Norris and Miss Warrington were not there all the time. They were there during part of the time. I had a conversation with Maury I. Diggs in the Peerless Restaurant with reference to something his father had said to him while in San Francisco. The Peerless Restaurant is in the City of Sacramento on 9th Street between "K" and "L." Miss Warrington was there when I got there and later on, just after I got there, Miss Norris came in. Mr. Diggs said, "I have just come up from San Francisco and my father is coming up Monday to have you and Lola and Marsha ar-
407–544 rested; He claims that you and Lola and Marsha are as much responsible for the position in which I am in as I am, and that he is going to put you three through everything I have gone through." He said, "I tried to keep him from coming up, but I could not, and he will be up here tomorrow morning." That is about the substance of what he said. He went over it and enlarged upon it. I replied, "Then, I am gone." I meant that when Mr. Diggs got there to have me arrested that I would not be there, that I was going to get out of town. First Mr. Diggs said that if I went it would be necessary for him to go and when he said that Miss Warrington said "I am going too, I can't stay here if you leave." And Lola—Miss Norris said—that she could not go, although she hated to stay in Sacramento and face things she thought or knew were going to happen but she could not leave. Thereupon Miss Warrington turned around and said, "Lola, I am going and you have got to go too." I believed the statements made by Mr. Diggs to me as having come from his father were true. I had already had a talk with him over the phone in which he said the same things, and by the tone of his voice I knew that he was extremely angry with me at that time, and from what Mr. Diggs said I gathered that his anger had grown. I told Miss Norris and Miss Warrington and

Maury I. Diggs of the conversation I had had with Mr. Lasley, to which I have testified. Prior to the conversation at the Peerless Restaurant I told them about what Mr. Lasley had said.

"Q. Did you ever read the White Slave Law?

"A. No sir.

"Mr. SULLIVAN: Wait a minute. I object to that as immaterial.

"The COURT: The objection is sustained. Let the answer be stricken out.

"Mr. HOWE: We note an exception."

(There was no cross examination of this witness.)

* * * * * * *

545 DIGGS
v.
UNITED STATES.

CAMINETTI
v.
SAME.

(Circuit Court of Appeals, Ninth Circuit. March 18, 1915. Concurring Opinion April 8, 1915.)

Nos. 2404, 2405.

1. Criminal Law ⁂721, 857—Witnesses ⁂305—Privilege from Self-Incrimination—Waiver—Comments on Failure to Testify.

Under Const. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself, and Act March 16, 1878, c. 37, 20 Stat. 30 (Comp. St. 1913, § 1465), providing that a person charged with an offense shall at his own request, but not otherwise, be a competent witness, and that his failure to make such a request shall not create a presumption against him, where a person charged with crime testifies in his own behalf, the waiver is complete, and he is no longer under the protection of the amendment, and his failure to testify concerning certain matters may properly be commented on and considered by the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1672, 2054, 2055; Dec. Dig. ⁂721, 857; Witnesses, Cent. Dig. §§ 1053-1057; Dec. Dig. ⁂305.]

2. Criminal Law ⁂780—Instructions—Testimony of Accomplice.

While it is the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, it is not reversible error to refuse an instruction to this effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. ⁂780.]

3. Criminal Law ⁂510—Testimony of Accomplices—Corroboration.

In the federal courts, corroboration of the testimony of an accomplice is not necessary to support a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. =510.]

4. Criminal Law =507—Testimony of "Accomplices"—Corroboration.

Women transported from one state to another for an immoral purpose are not "accomplices" to the offense of transporting them and furnishing tickets for their transportation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. =507.

For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

5. Witnesses =268—Cross-Examination of Accused—Scope.

Where, on a trial for transporting women from one state to another for an immoral purpose, though accused testified to nothing that occurred on the trip to such other state, he repeatedly referred in his testimony as to matters previously occurring *to* such trip to R., it was not improper to allow him to be asked on cross-examination what he meant by the R. trip, and whether he was accompanied on such trip by the women in question and another man charged with a similar offense.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. =268.]

6. Witnesses =268—Cross-Examination of Accused—Scope.

Where, on such trial, one of the women on cross-examination testified to intimate relations with accused, a question asked him on cross-examination as to whether he suggested to his counsel the questions asked her, to which he replied that he suggested that to his counsel a long time before he came into the courtroom, and might have made the suggestion during her cross-examination, and the statement
546 of counsel for the government that the defense, prompted by the defendant, put such questions, were not improper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. =268.]

7. Criminal Law =723—Argument of Counsel.

On a trial for transporting women from one state to another for immoral purposes, the prosecuting attorney in his argument stated that the eyes of the people of the United States were on the jury, and that 60,000,000 or 90,000,000 people were awaiting the verdict, respecting which statement the court, when objection was made, stated that this was merely a form of speech and that counsel should confine himself to the evidence. Counsel further remarked that, if there was any man who had sunk to the uttermost depths of depravity, it was the man in form alone who seduced a girl

and then exposed her shame to the world, and that if he had one redeeming trait of character, having blasted the life of a virgin, he would go to the penitentiary before going before a jury and admitting that he seduced her, and recounting the times when he had illicit intercourse with her, and that a decent man would die first, to which objection was made on the ground that accused had made no such admissions. Counsel further remarked that the government demanded that the laws enacted for the protection of young and decent women be rigidly enforced, and that an acquittal would be a blot upon the name of the state. The court told the jury to be guided solely by the evidence, and not by the statements or declarations of counsel, and accused requested no further instruction on this point. Held, that there was nothing so offensive or inflammatory in the remarks as to require a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1674, 1676; Dec. Dig. =723.]

8. Prostitution =1—Transportation of Women for Immoral Purposes—Elements of Offenses.

The immorality denounced by the White Slave Traffic Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1913, § 8813]), prescribing the punishment for knowingly transporting any woman or girl in interstate commerce for the purpose of prostitution or debauchery, or for any other immoral purpose, is not limited to commercialized vice, and the act applies to transportation for the purpose of making the girl the concubine or mistress of the person transporting her.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. =1.

Violations of White Slave Act, see note to Savage v. United States, 130 C. C. A. 2.]

9. Criminal Law =814—Instructions—Conformity to Evidence.

On a trial for transporting a women from one state to another for an immoral purpose, an instruction that, in considering her testimony and the weight to be given thereto, the jury might consider her motive in testifying, whether she had been or appeared to be acting under the influence of any person, and whether any promise of immunity had been offered to her, and any hope she might have for leniency in any criminal action brought against her, was properly refused, where there was no evidence tending to show any promise of immunity, or that she was acting under the influence of any one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. =814.]

=For other cases see same topic & Key-Number in all Key-Numbered Digests & Indexes.

10. Prostitution ⁼4—Transportation for Immoral Purpose—Sufficiency of Evidence.

Evidence held to support a conviction of C. for transporting two women from one state to another for an immoral purpose, though D., charged with a similar offense, purchased the tickets for the transportation.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. ⁼4.]

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11. Prostitution ⁼5—Transportation of Women for Immoral Purposes—Instructions.

Where, on a trial for transporting and procuring tickets for the transportation of women from one state to another for an immoral purpose, to wit, that they should be and become the concubines and mistresses of accused and another person charged with the same offense, the court read the indictment and statute to the jury, explained the meaning of the terms of the statute, defined "concubine," "mistress," and the term "debauchery," as used in the statute, and charged that if the women were taken to another state as testified by them, and while there accused and his companion cohabited with them as the testimony tended to show, the jury might find that they were taken there with the immoral purpose and intent charged, the jury could not have understood, as claimed, that accused and his companion were guilty if they merely seduced the girls.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 5; Dec. Dig. ⁼5.]

⁼For other cases see same topic & Key-Number in all Key-Numbered Digests & Indexes.

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the First Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Maury I. Diggs and F. Drew Caminetti were separately convicted of offenses, and they bring error. Affirmed.

Robert T. Devlin and Marshall B. Woodworth, both of San Francisco, Cal. (S. Luke Howe, of Sacramento, Cal., and Nathan C. Coghlan, of San Francisco, Cal., of counsel), for plaintiffs in error.

J. A. Cooper, of San Francisco, Cal. (Anthony Caminetti, Jr., of San Francisco, Cal., of counsel), for plaintiff in error Caminetti.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

GILBERT, *Circuit Judge:*

The two cases named above, although separately tried, arose out of a single transaction, in which each of the plaintiffs in error was

involved. For the reason that the points presented to this court are similar in the two cases, they will be disposed of in a single opinion of this court.

The indictment against Diggs contained six counts. He was convicted on the first four counts, and there was no verdict on the last two. The first count charged him with transporting Marsha Warrington from Sacramento, Cal., to Reno, Nev., for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become his concubine and mistress. The second count charged him with transporting Lola Norris from Sacramento to Reno, that she might become the mistress and concubine of Caminetti. The third count charged him with procuring a ticket for Marsha Warrington from Sacramento to Reno, with the intent that she should become his concubine and mistress. The fourth count charged him with buying a ticket for Lola Norris, with the intent that she should give herself up to debauchery, and for an immoral purpose, to wit, that she could be and become the concubine and mistress of Caminetti. The fifth and sixth
548 counts charged him with persuading, inducing, and enticing Marsha Warrington and Lola Norris to go to Reno for the immoral purposes set forth in the other counts.

The indictment against Caminetti contained four counts. The indictment was similar to that against Diggs, excepting the two counts relating to the purchase of tickets were omitted from Caminetti's indictment. He was convicted on the first two counts and acquitted on the last two.

[1] Error is assigned to the following instruction to the jury:

"After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip, nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or

innocence, since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

This assignment presents the question whether the waiver of the privilege of silence by a defendant in a criminal case in becoming a witness in his own behalf is a complete waiver, so as to place him in the position of any other witness in the case, or is only a partial waiver; that is to say, a waiver so far as the defendant sees fit to testify, leaving him, as to other matters, still under the protection of the fifth amendment. The statute of March 16, 1878 (U. S. Comp. Stats. of 1913, § 1465), provides that a person charged with an offense "shall at his own request but not otherwise be a competent witness. And his failure to make such a request shall not create any presumption against him." Upon a careful and cautious consideration of the question we reach the conclusion that the statute should be held to mean that the waiver is complete, and that when it has been made the defendant is no longer under the protection of the amendment.

The only cause we have found for hesitation in reaching that conclusion is the fact that the Circuit Court of Appeals for the Eighth Circuit, a court for which we entertain the highest respect, in a similar case (Balliet v. United States, 129 Fed. 689, 64 C. C. A. 201), held such an instruction reversible error. It is to be said, however, that while the opinion in that case contains no discussion of or reference to any adjudicated case of the state courts we think it is
549 not improbable that the conclusion reached was influenced by the then settled rule of the Supreme Court of the state of Missouri. But in 1913 the Supreme Court of Missouri in State v. Larkin, 250 Mo. 218, 157 S. W. 600, 46 L. R. A. (N. S.) 13, overruled its prior decisions. In that case the court said:

"We have carefully examined the statutes and holdings upon this question of more than 30 states, and we find that it has been held universally that, if the defendant is not sworn as a witness in his own behalf, any comment by the prosecuting attorney on his failure so to testify constitutes reversible error, in the absence of a peremptory and proper rebuke by the trial court. But, on the other hand, except in our own state and in California, where the question has been sometimes doubted, the right of the prosecuting attorney to comment upon the failure of the defendant, when he takes the stand as a witness in his own behalf, to deny or explain incriminating facts and statements, has been uniformly held allowable."

After citing numerous cases the court proceeded:

"The rule that no reference shall be made to the neglect, failure, or even refusal of a defendant to avail himself of his right to testify shall not be commented on, in the event he does not become a witness in his own behalf, is therefore, we find, universal; but, on the contrary, the rule that if he does go upon the witness stand he then stands in the precise attitude of *of* any other witness is, except in this state, and, as stated, in California, where the rule is subject to some doubt, also universal. Mr. Wharton, in his learned and

able work on Criminal Evidence, lays down in the tenth edition thereof the rule that such comment is allowable."

And the court referred to the earlier rule in Missouri as expressed in State v. Musick, 101 Mo. 271, 14 S. W. 214, in which it was said:

"These statements made by the state's witnesses were not denied by defendant, and therefore stand admitted, as much so as if the defendant had admitted them in terms."

We think that the opinion in Reagan v. United States, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709, should be taken as affirming, in substance, what was said of the rule so expressed in State v. Larkin. In that case Mr. Justice Brewer, for the court, referring to the act of March 16, 1878, said:

"On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. It is unnecessary to consider whether, when offering himself as a witness as to one matter, he may either, at the will of the government or under the discretion of the court, be called upon to testify as to other matters. That question is not involved in this case, and we notice it simply to exclude it from the scope of our observation. The privileges and limitations to which we refer are those which inhere in the witness as a witness, and which affect the testimony voluntarily given. As to that, he may be fully cross-examined. It may be assailed by contradictory testimony. His credibility may be impeached, and by the same methods as are pursued in the case of any other witness. The jury properly consider his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence in determining how much of credence he is entitled to."

In Brown v. Walker, 161 U. S. 591, 597, 16 Sup. Ct. 644, 647 (40 L. Ed. 819) the court said:

550 "Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure."

In Fitzpatrick v. United States, 178 U. S. 304, 316, 20 Sup. Ct. 944, 949 (44 L. Ed. 1078) the court said:

"While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury"—citing State v. Ober, 52 N. H. 459, 13 Am. Rep. 88.

In State v. Ober, so cited, the court said:

"Upon the whole, we are unable to reach any other conclusion than that the respondent's testimony, so far as it went (and not less the fact that it went no further), his refusal to submit to a full cross-examination, within proper limits, after waiving his con-

stitutional privilege, and all his conduct and demeanor, were proper matters for comment by counsel and court, as well as for the consideration of the jury."

How the Circuit Court of Appeals for the First Circuit understood the decision in the Fitzpatrick Case is shown in Jacobs v. United States, 161 Fed. 694, 699, 88 C. C. A. 554, 559, where Judge Putnam said:

"He offers himself as a witness, and therefore puts himself in the position of any other witness, so far that he may be examined with reference to anything pertinent to the case and admissible in evidence therein."

Very numerous decisions of the state courts may be cited which support the ruling of the court below in giving the instruction which is assigned as error. Thus, in State v. Tatman, 59 Iowa, 471, 13 N. W. 632, the court said:

"The attention of the jury may properly be called to the fact that the defendant has not testified as to a certain part of the case."

In Comstock v. State, 14 Neb. 205, 15 N. W. 355, it was held that a failure of the defendant to contradict a fact within his personal knowledge is in the nature of an admission of such fact. In Heldt v. State, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835, the court held that the district attorney may comment on such omission. In State v. Ulsemer, 24 Wash. 657, 64 Pac. 800, it was held that comment might be made upon the defendant's failure to deny incriminating facts in the evidence. The court said:

"He assumes the character of a witness * * * the same as any other witness."

The same rule has been applied in Kansas (State v. Glave, 51 Kan. 330, 33 Pac. 8), and in Alabama (Cotton v. State, 87 Ala. 103, 6 South. 372). In Clarke v. State, 87 Ala. 71, 6 South. 368, the court said:

"Like any other witness he must submit to cross-examination, and his failure to explain any fact or circumstances in his knowledge tending to exculpate him, is a proper subject of comment by the prosecution."

In Lee v. State, 56 Ark. 4, 19 S. W. 16, it was held that the failure of one charged with crime to testify in his own behalf shall not create a presumption against him, and does not prevent the prosecuting attorney commenting on defendant's failure to
551 deny certain testimony in relation to facts of which he must have had knowledge. In Brashears v. State, 58 Md. 568, the court in a similar case said:

"His conduct on the witness stand, and his silence, when testifying, as to matters within his knowledge, were circumstances which the jury had a right to consider in deciding upon the credit due to the witness, in connection with the other facts proved in the case, and they were, therefore, necessarily circumstances upon which the state's attorney had a right to comment in addressing the jury."

In State of Nevada v. Harrington, 12 Nev. 125, 130, the court said:

"Our conclusions are that, if the defendant in a criminal action

voluntarily testifies for himself, the same rights exist in favor of the state's attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses."

Many other cases may be cited to the same effect, and the textbooks adopt the rule thus expressed as established by a uniform line of decisions. In Wharton's Criminal Evidence, § 681, it is said:

"But if the defendant, having full opportunity to do so, failed on the stand to controvert that which was testified against him, this may be regarded, when the matter is one within his personal knowledge, as an admission of the truth of such testimony."

And such, we think, is the meaning of the decisions of the Supreme Court of the United States, cited above, and epitomized in Sawyer v. United States, 202 U. S. 150, 165, 26 Sup. Ct. 575, 579 (50 L. Ed. 972, 6 Ann. Cas. 269), where it is said:

"It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime."

We take this to mean that the waiver of the constitutional privilege of a defendant in a criminal case is a complete waiver, and places the defendant in the same attitude as that of a defendant in a civil action who testifies in his own behalf.

The plaintiff in error waived his privilege of silence when he took the witness stand and testified as to the subject-matter of the offense with which he was charged. He testified at length and in detail as to his relations with the two girls and his codefendant covering a considerable period of time, and ending abruptly at the railroad station at a late hour of the night on which the party took the train for Reno. There he stopped. He made no denial of the testimony that he purchased the train tickets and procured the drawing room on the Pullman car, or that the drawing room was actually occupied by the members of the party in the manner in which the girls testified that it was. Nor did he deny his participation in the discussion of the plan of securing a cottage or bungalow at Reno in which the party were to live during their stay at Reno. The jury, even in the absence of instruction from the court, would inevitably have taken his omission to testify as to those incidents to be an admission of the facts testified to by the two girls.

552 [2-4] Error is assigned to the denial of defendant's request for an instruction that the jury should determine from the evidence and circumstances whether Marsha Warrington and Lola Norris, or either of them, were accomplices of the defendants, and that, if it was found that they were, the testimony of an accomplice should be received with caution and weighed and scrutinized with great care by the jury, and that the jury should not regard the testimony of an accomplice, unless she is confirmed and corroborated in some material parts of her evidence. To this it is to be said:

First. A refusal to instruct as to the value of the testimony of an accomplice is not error for which a judgment should be reversed. In Holmgren v. United States, 217 U. S. 509, 523, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778), the court said:

"It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them."

Other courts also have said that such was the better practice, but, as the rule is stated in 2 Bishop, New Crim. Procedure, 1169, "they are not as of law required to give this advice."

Notwithstanding the views expressed by the Supreme Court in the Holmgren case as to the better practice, that court and the federal courts generally have held that corroborating testimony is not necessary to support a conviction. This court so held in Lung v. United States, 218 Fed. 817, — C. C. A. —. And it is believed that no court, state or federal, has held that it is reversible error to refuse to caution the jury to scrutinize with care the testimony of an accomplice. In Cheatham v. State, 67 Miss. 335, 7 South. 204, 19 Am. St. Rep. 310, the court said:

"The suspicion with which the testimony of accomplices is received by the courts, and their unwillingness to sustain convictions resting wholly upon the uncorroborated evidence of such persons, has led to the very general practice of advising juries to act with great prudence and suspicion upon such evidence, and to acquit unless there is corroboration in material particulars. But our researches have failed to discover a case in which a conviction has been set aside by reason of the court refusing so to instruct or advise."

The court, in that case, cited State v. Haney, 19 N. C. 390, in which, it was said, the Supreme Court of North Carolina had declared the true rule upon the subject, which was that:

"The practice of giving such instructions or advice to the jury rests in the discretion of the presiding judge, and his refusal so to do is not assignable as error." "No one," said the court, "can require of the judge to give an instruction to the jury, except on the law of the case. The judge may caution them against reposing hasty confidence in the testimony of an accomplice. It is usual, justifiable, and, we add, it is proper, to do so, where he has cause to apprehend that the jury may feel themselves bound to find a verdict conforming to the positive testimony of the witness, without weighing the circumstances of suspicion and distrust under which his testimony is rendered."

See note to Commonwealth v. Price, 71 Am. Dec. 678, in which a large number of cases are cited to the same effect.

In the present case the court instructed the jury that the evidence must be such as to satisfy their minds beyond a reasonable
553 doubt and to a moral certainty, and said that they should take into consideration the character and conduct of each witness, his relation to the controversy and to the parties, his expressed or apparent bias or partiality, the reasonableness or unreasonableness of the statements he makes, and all other elements which tend to throw light upon his credibility.

Second. We are of the opinion that as to the counts of the indictments on which the defendants were found guilty neither Marsha Warrington nor Lola Norris was an accomplice, for, while there was testimony on which, if credited, Marsha Warrington might have been deemed an accomplice of the defendants in persuading, inducing, and enticing Lola Norris to go to Reno, under the last two counts of the indictments that question is eliminated from the case by the verdict of the jury in acquitting each of the defendants on those counts.

"The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offense of which the accused is being tried." 12 Cyc. 445.

"Where a penal statute is intended for the protection of a particular class of persons, one of that class does not become an accomplice by submitting to the injury." 1 McClain, Criminal Law, §199.

Thus it is universally held that a woman on whom an abortion is committed is not an accomplice, although she assents to the act. But one may sustain such relation to an offense that, while not an accomplice in the commission of that offense, he may be indicted for a conspiracy to commit the offense. This was what was decided in United States v. Holte, 236 U. S. 140, 35 Sup. Ct. 271, 59 L. Ed. —. There it was held that it was not impossible for a woman transported in violation of the act of June 25, 1910, to be guilty of crime in conspiring for the commission of that offense. The court said:

"A conspiracy to accomplish what an individual is free to do may be a crime."

And the ruling of the court was illustrated by a reference to the crime of abortion, as to which, said the court:

"A woman may conspire to procure an abortion upon herself when under the law she could not commit the substantive crime, and therefore it has been held she cannot be an accomplice."

The court recognized the parity between the offense committed in transporting, or causing to be transported, a women under the act of June 25, 1910, and the crime of abortion, and the rule that, while the person as to whom either offense is committed cannot be an accomplice, she may be prosecuted as a co-conspirator to procure the commission of the offense.

[5] It is said that the trial court erred in compelling the defendant Diggs to testify to certain matters which were not the proper subject of cross-examination. In his direct testimony he had referred to conversations between the parties which took place just prior to the Reno trip, and in his direct examination he had said:

"I got the full information of all the trains and also the cost of transportation between different places from Sacramento to various positions. The next train leaving town was 10:45, the eastward train, and we all agreed to catch that train."

554 On his cross-examination, without objection, he had testified:

"I met Miss Warrington and Miss Norris frequently the first week preceding our trip to Reno."

And again he had said, also without objection:

"We left for Reno two weeks after meeting her on the levee."

Again he had said:

"I believe that was one week before we left for Reno on a Sunday night."

And again:

"That night we went to Reno."

After this testimony had been given, counsel for the government propounded this question:

"Q. In your testimony you have referred repeatedly to conversations and conferences that took place before the Reno trip. Now, what did you understand or mean by the Reno trip?"

The question was objected to as not cross-examination. The court overruled the objection and remarked:

"He is not asking him what occurred on that trip. He is simply identifying the trip."

The witness answered:

"It is perfectly evident what trip it was."

And in answer to the question:

"On that trip were you accompanied by Mr. Caminetti, Miss Norris, and Miss Warrington?"

The question was objected to as not cross-examination, and the witness answered:

"They were along; yes."

We are unable to see upon what ground it can be held that the testimony so admitted constituted error for which the judgment should be reversed. After the witness had referred frequently to the "Reno trip," it was not improper to ask him to identify the trip, and that was all that was done.

[6] It is contended that there was misconduct of counsel for the prosecution, permitted and condoned by the trial judge, prejudicial to the defendant Diggs, in that counsel for the government was permitted to ask of the said defendant on his cross-examination whether, during the course of the trial, and during the cross-examination of Marsha Warrington, he had not repeatedly suggested to his counsel questions to be propounded to her. Marsha Warrington on her cross-examination had testified as to her intimate relations with Diggs, in answer to questions propounded by the latter's counsel. Following this, and while Diggs was on cross-examination, he was asked:

"Didn't you suggest that question to your counsel? A. Well, I suggested that to my counsel a long time before I came into the courtroom; * * * that suggestion may have been made by me during the cross-examination of Miss Warrington. I won't say that I did not make the suggestion."

555 In view of that testimony, there was clearly no error in the ruling of the court upon the question which is presented in the assignment of error. It follows that it is not ground for reversing the judgment in the Diggs case that counsel for the government remarked:

"Counsel for the defense, prompted by the defendant, put these questions to Marsha Warrington."

[7] Error is assigned to certain statements and animadversions made by the government counsel as to the facts before the jury, the guilt of the defendants, the sanctity of the home, and the importance of the cases under consideration. The remarks of counsel principally complained of in both cases are the following:

"The eyes of not only the people of the state of California are upon you, gentlemen of the jury, awaiting your verdict in this case, but the people of all these United States; 60,000,000 or 90,000,000 people are awaiting your verdict in this case."

Upon objection of counsel for the defendants, the court observed:

"That is merely a form of speech"

—and directed counsel to confine himself to the evidence.

Again counsel for the government, in addressing the jury, said:

"Gentlemen, if there is any depraved man in the world, if there is any man who has sunk to the uttermost depths of depravity, it is that man in form, because he is a man in form alone, who seduces an innocent girl and then exposes her shame to the world. If he had one redeeming trait of character in his composition, having blasted the life of that virgin, he ought to be willing to take 50 years in the penitentiary before he would come before a jury of his fellow citizens, and before the world, and say, Yes, I seduced that girl; before he would come before a jury of his fellow citizens and recount time after time when he had illicit intercourse with this girl. A decent man would die first."

In the Diggs case objection was made by his counsel, Mr. Devlin, as follows:

"If your honor please, I except to that, because no such language came from the defendant; it all came from Marsha Warrington.

"Mr. ROCHE: It came from Marsha Warrington upon your cross-examination for the first time.

"Mr. DEVLIN: We had a right to cross-examine her.

"The COURT: Mr. Sullivan, confine yourself to the evidence; don't transgress it."

In the Caminetti case counsel for the government said:

"The Government of these United States, gentlemen of the jury, whom we have the honor to represent here, your government, as well as my government, the government of all of us, demands that the laws enacted for the protection and preservation of its young and decent women be adequately and rigidly enforced. An acquittal in this case would be a miscarriage of justice, and it would be a blot upon the fair name and escutcheon of California."

In this connection it is to be observed that in charging the jury the court said:

"I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness stand or in the way of exhibits or other physical objects which may have been laid before you."

556 And the court admonished the jury that they must not permit themselves to be influenced in their verdict by the fact

that the case had attracted so much attention and given rise to so much controversy in the public press, in the halls of Congress, and among the people. The court said:

"Those facts are wholly extraneous to your inquiry or to mine, and we have nothing whatsoever to do with them. They in no way affect the merits of the case, and you should be careful to avoid permitting any feeling of bias or prejudice flowing therefrom to find reflection in your verdict."

Counsel for the defendants were apparently satisfied with these instructions, and they made no request in either case that the jury be instructed to disregard the remarks of counsel. It is the general rule that improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal, unless the court has been requested to instruct the jury to disregard them, and has refused to do so. 12 Cyc. 585. In People v. Shears, 133 Cal. 154, 65 Pac. 295, it was held that, where the defendant did not invoke the action of the court to instruct the jury that it was improper, and to disregard it, but merely excepted to the remarks of the district attorney, the impropriety is not ground for reversal of the judgment, upon conviction of manslaughter. A similar ruling was made in People v. Babcock, 160 Cal. 537, 117 Pac. 549.

In Dunlop v. United States, 165 U. S. 486, 498, 17 Sup. Ct. 375, 379 (41 L. Ed. 799), the court said:

"There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation."

In Chadwick v. United States, 141 Fed. 225, 245, 72 C. C. A. 343, 363, language was employed by the district attorney more inflammatory and more subject to objection, we think, than the language used by the counsel for the government in the case at bar. In that case the defendant objected and excepted, and no ruling was made by the court. Judge Lurton, for the Circuit Court of Appeals, in reviewing the exception, held that there was no reversible error, and said:

"There is a degree of liberty allowable to counsel, whether for the government or the accused, in respect to the line of argument they shall pursue and the inferences to be drawn from the evidence, which a trial judge should respect until the facts of the case are overstepped or arguments used which plainly abuse the privilege. * * * But to entitle the accused to a reversal, when objection is made and the language not withdrawn, it must appear that the matter objected to was plainly unwarranted and so improper as to be clearly injurious to the accused."

In Johnston v. United States, 154 Fed. 445, 83 C. C. A. 299, this court in a similar case said:

"The use of language by counsel, calculated to prejudice a defend-

ant and not justified by the evidence, is improper and censurable, and should be discountenanced by the court. In such a case,
557 it is the duty of the trial court to set aside the verdict, unless satisfied that the improper language was not instrumental in securing it. But invective based on the evidence and inferences legitimately to be derived therefrom are not inhibited, and it is usually within the discretion of the trial court to determine whether or not the limits of professional propriety have been exceeded. Ordinarily the exercise of that discretion will not be reviewed in an appellate court, unless the invective is so palpably improper that it may be seen to have been clearly injurious."

We discover nothing so offensive or inflammatory in the remarks of counsel for the government as to require us on that ground to reverse the judgments. The trial judge, in the exercise of the discretion vested in him, did not regard the language of counsel as of sufficient importance to call for further interference or action on his part than as indicated in the above excerpts from the record, and therein, we think, there was no abuse of discretion.

[8] It is contended that the court in its instructions gave to the words "concubine" and "mistress" too wide and inclusive a meaning, and it is argued that the defendants, by transporting the women for the purpose of making them their concubines and mistresses, were not guilty of the offense defined in the act, and that the words "prostitution or debauchery, or any other immoral practice," do not include concubinage, and that the immorality denounced by the White Slave Traffic Act is only commercialized vice. The federal decisions are against these contentions. Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 43 L. R. A. (N. S.) 906, 57 L. Ed. 523, Ann. Cas. 1913E, 905; Athanasaw v. United States, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911; United States v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543; United States v. Flaspoller (D. C.), 205 Fed. 1006; Johnson v. United States, 215 Fed. 679, — C. C. A. —.

[9] It is assigned as error that the court refused to instruct, as requested by the defendants, that in considering the testimony of Marsha Warrington, and the weight to be given thereto, they might consider her motive in testifying, "whether or not she has been or appears to be, acting under the influence of any person or persons, whether or not any promise of immunity has been offered to her, and any hope she may have for leniency in any criminal action brought against herself." It is sufficient in answer to this assignment to point to the fact that there is in the record no evidence tending in any way to show that there had been a promise of immunity to Marsha Warrington, or that she was acting under the influence of any person or persons.

[10] It is urged that there was no evidence on which to find that Caminetti took any part in transporting the girls from Sacramento to Reno, but that, on the other hand, the evidence was that the tickets were purchased by Diggs alone. The record does not sustain this contention. There are many items of the testimony which show

that the journey to Reno was the result of the preconcerted action of both Diggs and Caminetti, and with a view to achieve a common purpose, which was, in fact, accomplished. Thus Lola Norris testified that, on the afternoon of the day on which they started for Reno, the four were together in a box at a restaurant, and that:

558 "When we agreed on Reno, just before Mr. Caminetti left, he gave me $20. I don't know whether he wanted me to buy my own, or buy my own and Miss Warrington's together."

Again she testified that on the same occasion Diggs said:

"Some one would have to manage the party, and the others would have to abide by his decisions. And so Mr. Caminetti said, 'I will make you the boss,' and so Mr. Diggs took charge of the party. Mr. Caminetti and Mr. Diggs were to share the expenses."

She testified that thereafter Caminetti left in search for money with which to pay for the trip, and that on his return—

"he said he had been having quite a time trying to locate the party who was to give him the money, but he finally succeeded in finding him, and he secured the money, and we all went down to the depot again. We reached the depot about 15 minutes before the train left, I think. Mr. Diggs went to the ticket office and bought the tickets."

She testified, also, that while Diggs was buying the tickets Caminetti—

"just stood there with us. * * * I heard no objection made by Caminetti to the suggestion of Mr. Diggs that he purchase the tickets."

There was testimony that Caminetti and Diggs together rented the bungalow in Reno which was occupied by the party, and that while there he ordered and paid for groceries to be sent to the bungalow. In view of these features of the evidence, and others not necessary to recount, the court below properly instructed the jury as follows:

"As to the question which has been argued by counsel whether the evidence is sufficient to show that the defendant transported or aided or assisted in transporting, these girls to Reno, you will understand that it is not necessary, to sustain this charge, that the defendant be shown to have himself paid for the tickets or other expenses of that trip. If he contributed to the means of paying such expenses, or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs, this would be sufficient on which to sustain the charge that the defendant aided and assisted in such transportation."

[11] It is contended that the instructions to the jury were erroneous, in that thereby the jury were led to believe that the defendants were merely charged with seducing the women named in the indictment, and that, if the jury so found, they might find the defendants guilty. This contention is not sustained by the record. It appears therefrom that the court read to the jury the indictment, in which it was charged that each defendant transported and caused to be transported the two girls named "for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine

and the mistress of the said defendant," and in which the same allegation was made as to Lola Norris. The court also read the statute and explained the meaning of its terms, and, among other things, charged the jury that if they found that these girls were taken to Reno on the occasion in question, as testified to by them, and that while there the defendant Diggs and his companion, Caminetti, cohabited with them as the testimony tends to show, "then you may find that they were taken there with the immoral purpose and
559 intent charged." In the instructions the court defined the terms "concubine" and "mistress" and the term "debauchery" as used in the statute; and it is clear from the whole of the instructions that the jury must have fully understood the nature of the charges against each defendant.

Since writing the above our attention has been directed to the recent decision of the Circuit Court of Appeals for the First Circuit, in Myrick v. United States, 219 Fed. 1, in which the majority of that court, Judge Putnam dissenting, reversed the judgment of the District Court and followed the rule announced in Balliet v. United States, 129 Fed. 689, 64 C. C. A. 201, above cited. In the majority opinion in that case reference is made to the fact "that the question has not been definitely decided by the Supreme Court." We still entertain the opinion, however, that the language of the statute and the utterances of the Supreme Court which we have cited are sufficiently broad and inclusive to justify the view which we have taken of the effect of the act of March 16, 1878. In this day of enlightened jurisprudence it is believed that the protection against self-incrimination conserved by the fifth amendment is to be classed with other bars which the rules of the common law placed against the admission of evidence of the truth, as to which, said Judge Dillon in State v. Gigher, 23 Iowa, 318, "the tendency of modern legislation and modern decision is to remove these bars and to let in the light." But protection against self-incrimination is still afforded in the provision that the defendant may or may not testify for himself as he may elect. We think that when he elects to become a witness he waives his constitutional privilege against self-incrimination, and that the true rule is stated in Wigmore on Evidence, § 2276 (2):

"The case of an accused in a criminal trial, who voluntarily takes the stand, is different. Here his privilege has protected him from being asked even a single question, for the reason that no relevant fact that could be inquired about would not tend to incriminate him. On this very hypothesis, then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts because of the necessary connection between all."

And (2) (*d*):

"The subject of the direct examination, properly construed, is the whole fact of guilt or innocence, and hence the topic of cross-examination might always range over any relevant facts, except those merely affecting credibility."

There are numerous other assignments of error, which we have carefully considered, but in none of them do we find ground for reversing either of the judgments.

Finding no error, the judgments are affirmed.

WOLVERTON, *District Judge* (concurring):

I am constrained, by reason of the importance of the cases under consideration, to set forth my views particularly touching the instructions of the trial court relative to the failure of the defendants, if such were the case, to deny or explain acts of an incriminating nature that the evidence of the prosecution established against
560 them, they having taken the witness stand in their own behalf. In order to a clear understanding of the view I entertain, it is essential that we get a comprehensive view of the situation.

First, as to the Diggs case. Diggs was indicted by six counts. By the first, he is charged with transporting Marsha Warrington from Sacramento, in California, to Reno, in Nevada, for the purpose of debauchery, and for an immoral purpose, namely, that she should become his concubine and mistress; by the second, that he transported Lola Norris from and between the same points, that she might become the mistress and concubine of F. Drew Caminetti; by the third, that he (Diggs) procured a ticket for Marsha Warrington from Sacramento to Reno, with the intent and purpose that she should become his concubine and mistress; by the fourth, that he procured a ticket for Lola Norris, with the intent and purpose that she should give herself up to debauchery, and for an immoral purpose, to wit, that she should become the concubine and mistress of one F. Drew Caminetti; by the fifth, that he (Diggs) persuaded, induced and enticed Marsha Warrington to go from Sacramento to Reno for the purpose of debauchery, and for an immoral purpose, to wit, that she should become his concubine and mistress; and by the sixth, that Diggs persuaded and enticed Lola Norris to go from Sacramento to Reno for the purpose of becoming the concubine and mistress of F. Drew Caminetti. Diggs was convicted on the first four counts, and acquitted on the last two. The elements of the offenses charged are few and simple, and comprise the transportation, the buying of the tickets, the persuasion and inducement, and the purpose with which these things were done. All were the subject of inquiry at the trial.

The story of Marsha Warrington as a witness runs from her first meeting with Diggs in September, 1912, to the time that the four were apprehended and placed under arrest in Reno, Nev. She tells of her acts and demeanor with relation to Diggs, and of his acts and demeanor toward her, of improper relations with him from time to time, of a trip to San Francisco with Diggs, Caminetti, and Miss Norris during the month of February, 1913, of Diggs' registering under a fictitious name with her as man and wife, of occupying the same room with him at the hotel during the night, of their going on to San Jose, where they were again registered as man and wife, and occupied the same room in the hotel for another night, of the party of the four who met at the house of Diggs in the absence of his wife in January before the Reno trip, and then in much detail the discussions between herself and Diggs, and the four of them, and what they did leading up to the final determination to go to Reno; also of what was done in procuring transportation, what was done on the

way, and what was done in Reno. It was a connected story from the beginning to the end. In all material particulars she was corroborated by Lola Norris.

Maury I. Diggs, after the government had rested, took the stand as a witness in his own behalf. He narrated in great detail the history of his relations with Marsha Warrington, and the many troubles that came to him from their acts and conduct prior to the Reno trip,
and also of the relationship existing between Caminetti and
561 Lola Norris, and of the relationship of the four, charging
Marsha Warrington with having had improper relations with him at the time the four were met at Diggs' house in the absence of his wife, a thing that Marsha Warrington denied. Continuing, Diggs dwelt at length upon the discussions had, and what happened between him and Marsha Warrington, and among the four of them, relative to his and Caminetti's leaving Sacramento for a while, owing to the reports of scandal that had arisen and the trouble in which they were involved. He relates that the first conversation he had with Marsha Warrington with respect to his leaving the city was on the Southern Pacific levee. This was two weeks and one day before March 9th, the Reno trip having been entered upon on the 10th. Then he tells of other conversations had with her, and with Caminetti and Lola Norris, relative to his and Caminetti's leaving the city for a while to escape the odium that was threatening if they remained. One conversation he specifies as having taken place while they were on an automobile ride, when he suspected they were being followed; another during the last week, ending March 9th, at the Columbia Hotel, in Sacramento, where Diggs was in hiding, he having called Marsha Warrington up and advised her of his whereabouts; another he names as having taken place at the Peerless Restaurant. This was on Saturday. He says:

"Then there was another conversation Sunday afternoon. That was out at Twenty-Eighth and J street. I believe I had called Miss Warrington up and made an appointment to meet her out there at the Park. That was relative to my going away. I still maintained that I was going South to get away from all this trouble. Miss Warrington said, 'Well, I have thoroughly made up my mind I am going, too. I am going with you.' * * * The proposition was thoroughly settled right there, that we were going to get out of town. We had not talked at that time of exactly where we would go, or anything of the kind; but I was very much of the opinion that I wanted to go to Los Angeles, owing to the fact that I had a lot of friends there that had lived there, and thought for a week or so I could have a good time down there, and come back home, and everything would be all right. I did not intend to take the girls. I did not care whether they went with me or went alone. In fact, I wanted Miss Warrington to stay. * * * After leaving Miss Warrington and Miss Norris in the Park, Miss Warrington had prevailed upon Miss Norris that she should go with her, and the girls said that we would meet at the Saddle Rock Restaurant at 8 o'clock. So I early made up my mind that I was going to leave town, and I agreed to meet them there."

From there he went home to his wife. He continues with his story:

"After I got in my house I thoroughly made up my mind to go and see my father and ditch the appointment with the girls, and not see them any more, and take a chance on the whole business. I told my wife good-by. * * * Mr. Hamilton rode as far as Eighth and J, and got off the car, and I went to the depot with the full intention of going on that train and coming to Berkeley and seeing my father. I missed the train by 5 minutes, owing to the fact that I had stopped at the office to get the suit. The car did not get me there in time. I turned around and came back and went to the restaurant. The girls were not there. I went to the cigar store next door and shook dice for cigars, the 'twenty-six' game. In a few minutes, a little after 8 o'clock, I believe, the girls showed up. * * * In the meantime Mr. Caminetti showed up on the scene. He was pretty much under the influence of liquor. He says, 'Well, what is doing?' I said, 'Well, I am going, and the girls say they are going, too.' He said, 'Where are you going?' I said, 'I don't know; anything to get out of town for a while.' He said, 'Well, I haven't got any money; I will go down town and get some,' which he did."

562 Here Diggs relates that he went out and made inquiry as to the time of departure of all trains leaving Sacramento that night. Then he continues:

"So the thing came up; the next train leaving town was 10:45, the eastbound train, and we all agreed to catch that train. I called Mr. Caminetti up on the telephone again. * * * He did not show up for that train. Miss Warrington and Miss Norris and I went over to the depot. When the train got ready to go, I thoroughly made up my mind between the restaurant and the depot that I did not care who went, or who was ready to go, or anything else; if the crowd was not ready to go, I was going alone; I was going to get out of town. Miss Caminetti did not appear. Miss Norris, I believe, stayed in the little car house, the street car station at the end of the line, at the depot. Miss Warrington walked over to the Southern Pacific Station with me, and the train stopped. We were contemplating about taking it. Marsha said to me, 'Now,' she said, 'You go on and take the train; if your wife is wise to me, I am scared to death; I am afraid she will cause you harm or trouble, or have you arrested, and you better get out of here.' I was contemplating in my own mind whether to take the train or not. Then I believe I said to Marsha, 'No, I will not take that train.' I said, 'If there is going to be any staying here, I am no piker, and I will stay here and face this whole thing with the rest of you; I am not going to go away and leave you here.' Then we went back to the restaurant. Mr. Caminetti did not appear, so we went back to the restaurant. * * * We all talked over again the serious condition that we were in and where we would go. There was no specific place mentioned at the time during the conversation as to where we would go; no terminal point at all. We merely talked over different routes and different lines and different times of arrivals of different trains going out of

Sacramento the different places. There was no positive terminal settled upon at all. That is about all that occurred there. At this time Caminetti had not got back yet. In nearly every conversation we had, when we spoke of our conditions and the probable arrest of us—us boys, I mean—Marsha or Lola, either one, invariably would ask, 'What will they do to us? What will happen to us if these things come out?' From our meager knowledge of the law, we explained to them as near as we could what would happen if anybody chose to pr s them, and they thereupon would ask, 'Who will press us?' I ca ot remember all the questions they asked, but Miss Warrington ask d me what my wife could do to her if she knew she was keeping company with me; and I told her that, owing to the fact that she was not 21, I thought—I said I was not straight on the Juvenile Law, but I believed she could institute proceedings against her through the Juvenile Court if she wanted to. I also told her that if she had any money my wife could sue her for alienation of her husband's affections. That was told her upon her request as to what would happen to her."

Thus ended the examination in chief of Diggs, testifying in his own behalf.

The testimony of the government shows, and it is not disputed, that the four took the train later on the same night for Reno. On cross-examination Diggs says: "We left for Reno two weeks after meeting her on the levee." And again he says, referring to a ride about town: "That was one week before we left for Reno." Further on he was asked: "In your testimony you have referred repeatedly to conversations and events that took place before the Reno trip. Now, what did you understand to mean by the Reno trip?" To which he answered, over objections: "It is perfectly evident what trip it was." And so it was, without question.

Now, the purpose of the defense in offering the testimony of Diggs to the point where he terminated it was threefold: First, to show that there was no persuasion or inducement on his part,
563 causing the girls to go on the trip; second, to discredit the girls; and, third, to shade the purpose for which the girls were taken or went upon the trip. This comprehends practically the whole case, except the fact of the purchase of the tickets and the transportation from Sacramento to Reno. And yet these latter are so conjoined in time and circumstance with the former that there is no discernible line of cleavage whereby the testimony touching the one set of facts may be cut off from its relation to the other.

I am firmly persuaded that the defendant, having taken the stand and offered his testimony upon the merits of his case, and having entered into it in part, rendered himself amenable to cross-examination as to the whole, and, further, when he sought to show that the girls went upon the journey of their own free will and accord, without persuasion and inducement upon his part, then that his acts and demeanor at the time of leaving, including the purchase of tickets, and while upon the trip and at Reno, became subjects of perfectly legitimate inquiry to test the accuracy of his o n rendition

of how they all came to go upon the same journey. A defendant cannot tell a half story touching his defense, which is a half story from his standpoint of the merits of the case, then abruptly stop in his course and decline to answer further, and expect to reap the benefit for himself to be derived therefrom, without incurring the discredit that is, by the rules of evidence and legal inference, visited upon the ordinary witness pursuing a like course. Mr. Wigmore, in his work on Evidence (volume 4, § 2276, subd. 2), states the rule very succinctly which I think is applicable in the present case. After having discussed the rule applicable in the case of an ordinary witness, he says:

"The case of an accused in a criminal trial, who voluntarily takes the stand, is different. Here his privilege has protected him from being asked even a single question, for the reason that no relevant fact that could be inquired about would not tend to criminate him. On this very hypothesis, then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all. His situation is distinct from that of the ordinary witness, with reference to the point of time when a waiver can be predicated, because the ordinary witness is compelled to take the stand in the first instance, and his opportunty for choice does not come till later, when some part of the criminating fact is asked for, while the accused has the choice at the outset. From the point of view of the actual prescience of witness and accused, the result is the same. Each knows well enough that the inquiries will be upon topics relevant to the charge in issue; but that is immaterial. The question is: What does he know as to the connection between the first question and a possible subsequent incriminating question? Now, the accused knows that there must always be such a connection, and, if there is not, then his answer cannot be a waiver. The result is, then, that the accused, as to all facts whatever (except those which merely impeach his credit, and therefore are not related to the charge in issue), has signified his waiver by the initial act of taking the stand."

Further on he says (subdivision "*d*"):

"The subject of the direct examination, properly construed, is the whole fact of guilt or innocence, and hence the topic of cross-examination might always range over any relevant facts except those merely affecting credibility."

So it is said, in State v. Wentworth, 65 Me. 234, 243 (20 Am. Rep. 688):

564 "If he [defendant] discloses part, he must disclose the whole in relation to the subject-matter about which he has answered in part. * * * Answering truly in part with answers exonerative, he cannot stop midway, but must proceed, though his further answers may be self-incriminative. Answering falsely as to the subject-matter, he is not to be exempt from cross-examination because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth."

And again it is said, in State v. Ober, 52 N. H. 459, 13 Am. Rep., 88:

"Having testified concerning a part of the transaction, in which it was alleged that he was criminally concerned, without claiming his constitutional privilege, it was too late for him to halt at that point which suited his own convenience."

See, also, Connors v. People, 50 N. Y. 240; Stover v. People, 56 N. Y. 315; Heldt v. State, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835; Lee v. State, 56 Ark. 4, 19 S. W. 16; Clarke v. State, 78 Ala. 474, 56 Am. Rep. 45; State v. Tatman, 59 Iowa, 471, 13 N. W. 632; State v. Larkin, 250 Mo. 218, 157 S. W. 600, 46 L. R. A. (N. S.) 13; State v. Rafferty, 252 Mo. 72, 158 S. W. 585.

The Supreme Court has enunciated the same principle, while perhaps not deciding the exact question here involved. In Fitzpatrick v. United States, 178 U. S. 304, 315, 20 Sup. Ct. 944, 948 (44 L. Ed. 1078), the court says:

"Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf, and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor, without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are."

In this case reference is made to State v. Lurch, 12 Or. 99, 6 Pac. 408, and State v. Saunders, 14 Or. 300, 12 Pac. 441. But these cases fall clearly within the exception noted by Mr. Wigmore. The Oregon statute seems to limit the right of cross-examination to "all facts to which he [defendant] has testified." Sess. Laws 1880, p. 28.

In Sawyer v. United States, 202 U. S. 150, 165, 26 Sup. Ct. 575, 579 (50 L. Ed. 972, 6 Ann. Cas. 269), the court seems to have interpreted the rule slightly more broadly than was announced in the Fitzpatrick Case. It says:

"It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief, with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime."

And again, in Powers v. United States, 223 U. S. 303, 315, 32 Sup. Ct. 281, 284 (56 L. Ed. 448), the court says:

565 "Having taken the stand in his own behalf, and given the testimony above recited, tending to show that he was not

guilty of the offense charged, he was required to submit to cross-examination, as any other witness in the case would be, concerning matter pertinent to the examination in chief."

These cases, it would seem, in principle, decide practically the very point in issue here. When it is once ascertained that the inquiry touching what was done at the depot on the night and at the time the four left for Reno, and what took place on the journey, and what happened at Reno, was proper and legitimate subject-matter for the cross-examination of Diggs, it follows with absolute persuasion that the court's instruction complained of was not error for which a reversal should be had.

The case of Balliet v. United States, 129 Fed. 689, 64 C. C. A. 201, would seem to be opposed to this view, but we are not advised respecting the testimony offered in chief, and are without light as to the precise relation which the inferences sought to be drawn bear to the matter testified to. Sanborn, Circuit Judge, in his concurring opinion, has this to say on the subject:

"But in the federal courts the line of demarcation which limits a rightful cross-examination is clear and well-defined. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify."

It may be that the defendant might be called to testify to some collateral fact—that is, as to some matter distinct from the real merits of the case and yet having some pertinent bearing—and not be subject to cross-examination as to the merits; as, for instance, if a defendant in a murder case were called to testify merely whether or not he was related to the deceased. In such a case it would be a strange stretch of the rule to hold that he could be cross-examined as to whether he committed the murder. But where a defendant has taken the stand, and has once entered upon a disclosure or a recital of part of the details relating to the offense charged, the offense charged becomes the subject-matter of the inquiry in chief, and the defendant subjects himself to cross-examination touching the entire subject-matter. And this is my position in the present case. With all due respect for the court deciding the Balliet Case, I am unable to adopt its conclusion.

In the very recent case of Myrick v. United States, 219 Fed. 1, the court was of the opinion:

"That the defendant Cunningham, by taking the stand and testifying as to the commissions paid to agents, did not waive his constitutional right to be free from unfavorable comment on matters to which his testimony did not relate, and as to which he said nothing."

This case I do not regard as opposed to the view here entertained.

I have discussed in particular the Diggs case. But the facts of the Caminetti case, although Caminetti did not go so minutely into the previous relationship existing between him and Diggs with Lola Norris and Marsha Warrington, bring it within the same principle, and the same conclusion would follow, Caminetti's especial

purpose in testifying was to show the particular motive which induced him to embark upon the expedition.

566 Upon all other questions in the case, I concur with the views expressed by Judge Gilbert in the prevailing opinion.

Ross, *Circuit Judge* (dissenting):

These are companion cases, the respective plaintiffs in error being companions in the transactions out of which the cases arose. The record and arguments in each case are much alike, and therefore the cases may be properly and conveniently disposed of together.

The party defendant in the first case tried in the court below—Diggs—was at the times in question about 26 years old, residing with his wife and one child in the city of Sacramento, where, according to the evidence he was somewhat prominent as an architect and otherwise.

The defendant in the other case—Caminetti—was about two years younger, and had a wife and two children with whom he resided in the same city, and where he occupied an official position of some consequence, and was also a man of some prominence. The two were close friends. Two girls, named respectively Marsha Warrington and Lola Norris, were at the same time living in the same city—the first mentioned with her father and stepmother, and the second with her parents, all of whom were respectable people.

In both cases there was testimony given tending to show that several weeks before the commission of the acts which constitute the basis of the indictments a saloon keeper named Austin, who was an intimate friend of Diggs, and also a friend of Miss Warrington, introduced the two on a street in Sacramento. Miss Warrington was then about 20 years old and a stenographer; Lola Norris, about a year younger, was her intimate friend. The result was that these four persons almost immediately commenced going about together frequently, often to disreputable places, at different times Diggs taking the four in his machine on trips about the city and to outside places, where they sometimes spent the night; he registering under an assumed name with Marsha Warrington as his wife, and Caminetti under an assumed name with Lola Norris as his wife, in each instance where the night was spent away from home the girls deceiving their respective parents by false representations as to where they were going.

The two girls were the chief witnesses against the defendants on their trials. Marsha Warrington herself testified to her seduction by Diggs and that she had become pregnant by him prior to the trip to Reno, Nev., upon which trip the indictments are founded. Lola Norris testified that Caminetti had not accomplished his diabolical purpose prior to their arrival in Reno, although she admitted that she had spent the night with him on at least one of the trips out of Sacramento to near-by places, and had occupied the same bed with him in the drawing room of a Pullman car on the trip to Reno; Diggs and Miss Warrington occupying the other bed in the same drawing room.

There was evidence tending to show that prior to the Reno trip the conduct of these four persons had become more or less known in Sacramento and a subject of comment there, and that publicity as well as court proceedings became imminent before the four departed from Sacramento for Reno, Nev., from which latter place
567 they were brought back by officers of the law after having spent several days and nights in Reno in a cottage which the men had rented under assumed names, and where Diggs lived with Miss Warrington as husband and wife, and where Caminetti maintained the same pretended relationship with Miss Norris.

Subsequently the indictments in the present cases were presented and filed—that against Diggs containing six counts, and the one against Caminetti four counts.

In the Diggs case the first count is, in substance, that on the 15th day of January, 1913, at Sacramento, the defendant did willfully, knowingly, feloniously, and unlawfully transport and cause to be transported, and aid and assist in obtaining transportation for, Marsha Warrington from Sacramento, Cal., to Reno, Nev., over the line of the Southern Pacific Company, a railroad corporation engaged in carrying passengers from one state to the other, "for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and the mistress of the said defendant."

The second count contains like averments in respect to Lola Norris "for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and the mistress of one F. Drew Caminetti."

The third count charges that the defendant on the 15th day of January, 1913, at Sacramento, did willfully, unlawfully, and feloniously, knowingly procure and obtain, and cause to be procured and obtained, and aid and assist in procuring and obtaining, a ticket issued by the Southern Pacific Company at its office in the city of Sacramento for passage between that city and Reno, in the state of Nevada, to be used by Marsha Warrington, in interstate commerce, in traveling from Sacramento to Reno over the line of the Southern Pacific Company, a common carrier engaged in the business of carrying passengers between the points named, whereby the said girl was then and there so transported, "with the intent and purpose on the part of the said defendant that said girl, Marsha Warrington, should give herself up to debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and the mistress of the said defendant."

The fourth count contains substantially the same averments as the third, except as to the name of the girl; Lola Norris being therein named, instead of Marsha Warrington, and excepting the intent with which such transportaion of Lola Norris is alleged to have been made, the same being, as alleged in the second count, "with the intent and purpose on the part of the said defendant that said girl, Lola Norris, should give herself up to debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should

be and become the concubine and the mistress of one F. Drew Caminetti."

The fifth count alleges that on the same day and year, at Sacramento, the defendant did willfully, unlawfully, and feloniously, knowingly persuade, induce, and entice, and cause to be persuaded, induced, and enticed, and aid and assist in persuading, in-
568 ducing, and enticing Marsha Warrington to go from Sacramento, Cal., to Reno, Nev., in interstate commerce over the line of railroad of the Southern Pacific Company, "for the purpose of debauchery and for an immoral purpose, to wit, that she, the said Marsha Warrington, should be and become the concubine and the mistress of the said defendant."

The sixth count makes substantially the same allegations as the fifth, except in respect to the girl named; Lola Norris being therein named, instead of Marsha Warrington, and except in respect to the intent, which is therein charged to be "for the purpose of debauchery and for an immoral purpose, to wit, that she, the said Lola Norris, should be and become the concubine and the mistress of one F. Drew Caminetti."

Under that indictment Diggs was found guilty as charged in the first four counts, upon which conviction the judgment against him is based; the jury returning no verdict in respect to the last two counts of the indictment, and no further action by the court in respect thereto appearing to have been taken.

In the Caminetti case the first count charges, in substance, that on the 15th day of January, 1913, at Sacramento, Cal., the defendant did willfully, knowingly, and feloniously, unlawfully transport and cause to be transported, and aid and assist in obtaining transportation for, and in transporting in interstate commerce, from Sacramento to Reno, Nev., over the line of railroad of the Southern Pacific Company, a common carrier engaged in carrying passengers between the two cities named, a certain girl, to wit, one Lola Norris, "for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant."

The second count contains substantially the same averments as the first, except that Marsha Warrington is therein named, instead of Lola Norris, and except as to the intent, which is therein charged to be "for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and the mistress of one Maury I. Diggs."

The third count charges, in substance, that the defendant on the day and year already mentioned, at Sacramento, did willfully, unlawfully, and feloniously, knowingly, persuade, induce, and entice, and cause to be persuaded, induced, and enticed, and aid and assist in persuading, inducing, and enticing, Lola Norris to go from the city of Sacramento, Cal., to Reno, Nev., in interstate commerce over the line of railroad of the Southern Pacific Company, a common carrier of passengers between the points named, "for the purpose of debauchery and for an immoral purpose, to wit, that she,

the said Lola Norris, should be and become the concubine and the mistress of the said defendant."

The fourth count makes substantially the same charges as the third count, except as to the girl, who is therein alleged to be Marsha Warrington, and in respect to the intent, which is therein alleged to be "for the purpose of debauchery and for an immoral purpose, to wit, that she, the said Marsha Warrington, should be and become the concubine and the mistress of one Maury I. Diggs."

Under that indictment Caminetti was found by the jury
569 guilty as charged in the first count, and not guilty upon each of the other counts, upon which verdict the judgment against him is based.

In each case the distinct and specific purpose alleged in the indictment in the alleged acts of the defendant, as respects Marsha Warrington, was that she "should be and become the concubine and the mistress of" Diggs, and, as respects Lola Norris, that she "should be and become the concubine and the mistress of" Caminetti.

However depraved and heinous the conduct of the two men was, yet, when brought before the court upon indictment, the same legal presumption of innocence of the offenses charged attended them that accompanies every other person legally charged with crime, and the same obligation rested upon the prosecution to establish their guilt by legal proof beyond a reasonable doubt that arises in the case of every other person legally accused of crime—the ultimate determination of the facts resting, as in every criminal case, with the jury, rightly instructed by the court as to the law governing the case.

In each of the present cases a large amount of evidence was introduced and many incriminating facts and circumstances testified to. Witnesses were sworn and testified on both sides. In the Diggs case that defendant was sworn on his own behalf and testified at length concerning his relations with Miss Warrington, and concerning the actions and relations of all four of the persons here under consideration, prior to their departure from Sacramento on the Reno trip; but in respect to their actions and relations on that trip, and while remaining in Reno, he neither testified nor was questioned, either on direct or cross-examination. In respect to all of those matters he chose to remain silent; and one of the principal questions in the Diggs case relates to the instruction given by the trial court to the jury respecting his silence in that regard.

On the part of the prosecution the actions and relations of the parties on the Reno trip and during the time they remained in that city *was* fully gone into, and much evidence was also given by the government tending to show that the two girls were persuaded and induced by the two men to go with them on that trip, although the testimony given by Diggs in his own behalf, if believed by the jury to be true, directly tended to show that there was no inducement or persuasion on the part of the men, but, on the contrary, that the girls went with them willingly, and, as to Miss Warrington, insistently.

Among the details of the trip and the stay of the four in Reno was the following testimony of the two young women introduced on be-

half of the prosecution: That they left Sacramento for Reno the night of March 9, 1913, is undisputed. Among other things, Miss Warrington testified:

"After Mr. Diggs, Miss Norris, and myself reached the depot, the train came in, and I told Mr. Diggs to go on and take the train, and that I was perfectly willing to stay in Sacramento and would not go with him. He said, 'No;' that he wanted me to go."

Caminetti not having been in time for that train, Diggs reached him by telephone and arranged a further meeting of the
570 party with Caminetti at the Saddle Rock restaurant, concerning which meeting Miss Warrington further testified:

"When Mr. Caminetti reached there, he said he had some money and that he would go on the next train. We then left the Saddle Rock and went to the depot, reaching it about 12 o'clock. Mr. Diggs said for us to wait and he would get the tickets; we waited, and he got the tickets at the ticket office in the depot. I waited with Mr. Caminetti and Miss Norris; then the train came and we got on. It was an ordinary Pullman car, and Mr. Diggs got a drawing room from the Pullman conductor and he paid for it. We waited until it was made up, then the four of us entered. Mr. Diggs, I think, ordered the porter to make up the drawing room. There were three beds—the upper and lower berths and a little side bed. We all went to bed right after we entered the room. Miss Norris and Mr. Caminetti had the upper berth, and Mr. Diggs and I had the lower berth. Miss Norris got in the upper berth two or three minutes after we entered the room. I think she got her clothes off up there, her shoes, her skirt, and her waist and her hat. Mr. Caminetti got in the berth the same time she did. I think he took his clothing off up there. I got in the lower berth first. Before getting into it I took off my skirt and waist and pumps. Mr. Diggs took off his shoes and coat, and I think he took off his trousers and his outer shirt. * * * I saw Mr. Diggs give the tickets to the conductor."

Miss Norris, also sworn on behalf of the prosecution, gave similar testimony to that of Miss Warrington just quoted, and in the course of her testimony said, among other things:

"We reached Reno about 8 or 9 o'clock next morning."

And again:

"I recall when the train reached Truckee. We arose about an hour and a half before the train reached Reno. Upon our arising in the morning, Mr. Diggs said that they would get a cottage when we got into Reno. All four of us were to live in the cottage."

Referring to the time of reaching Reno, Miss Warrington also testified:

"I remained in the berth with the defendant Diggs until about 8 o'clock the next morning, I think. Mr. Diggs got out first. Mr. Caminetti, I think, got out of the upper berth first. I recall reaching Reno that morning. It was before noon, I think; the first place we went was to a café to have our lunch. * * * Then Mr. Diggs and Mr. Caminetti went to the real estate firm, I think.

In respect to the meeting at the Saddle Rock restaurant Miss Norris also testified:

"At the Saddle Rock restaurant, just before leaving, Mr. Caminetti gave me some money and told me to buy my own ticket to Reno. Mr. Diggs saw him give it to me, and he said that he would buy all the tickets; that it would never do for us to separate, and for Miss Warrington and I to go together, and they go together, away from us. And he said—We had been talking about places to go, and they had suggested several places, and Mr. Diggs said it would not do for every one to have suggestions; that each one, of course, thought his was the best, and that some one would have to manage the affair; somebody would have to be the boss; 'Now who will it be;' and Mr. Caminetti said, 'Well, I name you to be the person to manage the trip;' and so he considered himself the boss."

The party left Sacramento shortly after midnight of March 9, 1913, by the Southern Pacific Railroad. On their arrival in
571 Reno the next morning they at first went to the Riverside Hotel, concerning which Miss Warrington testified:

"They said we should go to the hotel and wait for them, and they would try and rent a house for one month at least. I think they said they were going to stay in Nevada about six months. * * * They told us that when we reached the Riverside Hotel we should wait there until they returned. They returned about 5 o'clock. Then they registered, after which we went upstairs to the suite of three rooms, two bedrooms, with a sitting room between. We occupied these rooms just one night, and left about 9:30, I think, next morning. Mr. Caminetti and Miss Norris had one, and Mr. Diggs and I had the other room. We retired about 10:00 o'clock. We all discarded our wearing apparel. Mr. Diggs occupied the bed with me, and Miss Norris occupied the other bed with Mr. Caminetti."

And concerning which Miss Norris testified:

"Mr. Diggs and Mr. Caminetti went over to the clerk's desk in the office of the hotel and reserved three rooms, a suite of rooms. Mr. Diggs told us that he registered as Mr. Enright and wife, and Mr. Caminetti registered as Mr. Ross. * * * There were three rooms, two bedrooms and a sitting room. Mr. Caminetti and I occupied one, and Mr. Diggs and Miss Warrington the other. I discarded most of my wearing apparel that night."

On the day of the arrival of the party in Reno the men rented from a man named Mergen, acting for a firm of real estate agents there, a cottage, concerning which transaction Mergen testified on behalf of the prosecution:

"I recall negotiating with Mr. Enright on the 10th of March, 1913, for the renting of that cottage. * * * The name Enright was given me by himself. I would recognize the man again if I saw him in this courtroom. Q. Will you kindly look around and see if he is here? A. He is right there, with his hand up to his face.

"Mr. ROCHE: You will concede, gentlemen, that that is the defendant.

"Mr. DEVLIN: Yes."

And in respect to the stay and actions of the parties in question while in Reno Miss Norris further testified:

"I knew that Mr. Caminetti went by the name of Ross at Reno,

and that I was going by the name of Mrs. Ross, and that Mr. Diggs and Miss Warrington were going by the name of Enright and wife. * * * Mr. Diggs and Miss Warrington occupied the front bedroom, and Mr. Caminetti and I the back bedroom. Mr. Caminetti and I had sexual intercourse in that bungalow. He said he would marry me, and I believed him."

And Miss Warrington also testified:

"While at Reno I had sexual relations with Mr. Diggs."

Upon the conclusion of all of the evidence in the Diggs case, the court, after argument by the attorneys of the respective parties, instructed the jury, giving, among other instructions, this in respect to the defendant:

"The defendant has taken the stand in his own behalf, and so far as his testimony tends to cover the transaction involved in the charges against him, it is somewhat at variance with that of the two girls, Miss Warrington and Miss Norris; that is, according to his story of their intimacy, he makes it appear that Miss Warrington was apparently pursuing him as much as he was pursuing her, if not more, and he claims that when he suggested the idea of leaving Sacramento alone she protested that she should not be left behind, but should go with him, and that it was she, and not the defend-
572 ant, who insisted that Miss Norris should accompany them.

Now this conflict, so far as it exists, is for you to determine; that is, you will say whether the statements of these girls are true, or that of the defendant, to the extent that you find it material to determine in order to reach your verdict. The testimony of the defendant, however, does not cover the entire transaction as testified to by the two girls and the other witnesses for the prosecution. After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip, nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compeled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be com-

mented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

It must be remembered that neither of the defendants to these cases was on trial for fornication or adultery. While both of those acts are made a crime and punishable as such by the laws of the state of California, neither is made a crime by any law of the United States. The statute of the United States upon which the present prosecutions are based is the act of June 25, 1910 (36 Stat. 825, c. 395), which the act itself expressly declares "shall be known and referred to as the 'White Slave Traffic Act,'" the second, third, and fourth sections of which are as follows:

"SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

573 "SEC. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any territory or the District of Columbia, shall be deemed

guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

"SEC. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any state or territory or the District of Columbia to any other state or territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court."

In each indictment the charges related only to the trip of the parties in question from Sacramento, Cal., to Reno, Nev., and to the acts and circumstances connected with and growing out of that trip. Those acts and circumstances are in part detailed by the testimony of the witnesses Marsha Warrington and Lola Norris above quoted, in respect to which the defendant neither testified nor was questioned on either his direct or cross-examination. In respect to those matters he chose to avail himself of the privilege conferred upon him by article 5 of the amendments to the Constitution of the United States, which reads:

"No person * * * shall be compelled in any criminal case to be a witness against himself"

—and of the act of Congress of March 16, 1878 (20 Stat. 30, c. 37), which is as follows:

"That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States court, territorial courts, and court-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

To the extent that the defendant waived the immunity extended to him by the provisions of the Constitution and statute of the United States above quoted, he placed himself, as the court below properly told the jury, in the position of any other witness, and subjected his testimony to comment, by both counsel and court, to the same extent as may be properly and legally made by either respecting the testimony of any other witness. Authorities to that effect are
574 very numerous, and many of them are referred to by the respective counsel in the present cases. But such waiver does

not, in my opinion, extend beyond the testimony given by the defendant, and the inferences and conclusions to be drawn therefrom, where he does not refuse to answer any proper question.

The counsel for the government have cited many authorities as to the proper limits to the cross-examination of a defendant in a criminal case who voluntarily goes on the stand as a witness, and as to the inferences to be drawn from his refusal to answer proper questions on cross-examination. But all such authorities are wholly inapplicable to the present cases for the reason that the direct examination of both defendants here was confined to matters occurring before the commencement of the Reno trip, and the only defendant who was cross-examined at all—Diggs—does not appear to have refused to answer any proper question. To hold that any inference or conclusion can be properly drawn from a failure of the defendant to explain or deny matters or circumstances concerning which he did not testify and concerning which he was not questioned, either on direct or cross-examination, would, in my opinion, manifestly be to make his silence in respect to such matters and circumstances evidence against him, contrary to the provisions of the Constitution and statute above quoted. And so the Circuit Court of Appeals for the Eighth Circuit in effect held in Balliet v. United States, 129 Fed. 689, 695, 64 C. C. A. 201, 207, where the court said:

"We have next to consider whether the jury were misdirected, and only one alleged error of this sort is called to our attention. At the conclusion of a somewhat lengthy charge, the trial judge made this statement, to which an exception was duly taken: 'It has been suggested that I have overlooked one thing. I may say you may consider, in determining the question, the fact that the defendant having gone upon the witness stand, if he has not fully explained, or has not explained matters which are material to the issues in this case, and which are naturally within his knowledge, you may consider that as a circumstance tending to show that the facts, if explained, etc., would bear out the contention of the government, and his failure to explain them or give a truthful explanation is against him.'

"We have not been able to conclude that this instruction states a correct rule of law, or that the giving of it was not a material error. As we interpret this instruction, it means that, inasmuch as the defendant had elected to testify in his own favor, if while on the stand he had not fully explained all matters and things material to the issues in the case which the jury might think were naturally within his knowledge, then the jury might conclude that the facts, etc., if he had indulged in an explanation concerning them, would have borne out the contention of the government (that is, shown that he was guilty), and that his failure to explain was against him (that is, would justify a conclusion of guilt). This rule of law would put the defendant in a criminal case in a peculiar attitude, for if he takes the stand as a witness he must perforce explain every fact and circumstance which has been put in evidence against him, as tending to establish guilt, which a jury may deem

material, and such as he could explain, at the risk of having them conclude, because of his silence as respects such facts and circumstances, that they are true and that he is guilty. If a defendant in a criminal case desires to take the stand and contradict some particular fact or circumstance that has been testified to, he cannot safely do so for fear of raising a presumption of guilt by his failure to explain other facts and circumstances in evidence which the jury may happen to regard as material and may think the accused could explain. The federal statute (Act March 16, 1878, c. 37, 20 Stat. 30 [U. S. Comp. St. 1901, p. 660]) provides, in substance,
575 that a person charged with an offense shall at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.' When the defendant in a criminal case, in compliance with this statute, waives his constitutional privilege by taking the witness stand, he occupies the attitude of any other witness, and may be cross-examined like an ordinary witness, and to the same extent. Fitzpatrick v. United States, 178 U. S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078. The federal statute does not, like the statutes of some states (vide Rev. St. Mo. 1899, § 2637), expressly provide that the examination of the accused shall be limited to the matters testified to on his direct examination, but we apprehend that it should be so limited, because that is the general rule which obtains in the federal courts relative to the cross-examination of all witnesses except, when the rule is relaxed, as it sometimes is, on grounds of convenience or necessity. Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503; Wills v. Russell, 100 U. S. 625, 25 L. Ed. 607; Montgomery v. Ætna Life Ins. Co., 38 C. C. A. 553, 97 Fed. 913; Goddard v. Crefield Mills, 21 C. C. A. 530, 75 Fed. 818; Safter v. United States, 31 C. C. A. 1, 87 Fed. 329. It is also doubtless true that, when a defendant in a criminal case takes advantage of the statute and testifies in his own favor, the government may comment on his testimony and draw inferences therefrom as freely as if he were an ordinary witness and not the accused. It is only where the accused fails to testify that the statute prohibits unfavorable comment and attempts to create a presumption against him because he has not done so. Conceding this much, we are nevertheless of opinion that the instruction in question went too far, in that it required the accused to explain every fact and circumstance which had been introduced against him, and gave to them additional probative force because he had not done so or attempted to do so. Furthermore, it left the jury at full liberty to determine what matters which had been given in evidence were "material to the issues in the case," without directions on that point, and equal liberty to determine what matters were 'naturally within his knowledge' and susceptible of explanation. The testimony in the case had taken a very wide range and covered a considerable period of time. While on the stand some facts and circumstances that had been introduced in evidence may have been overlooked by the accused or by his counsel, and he may not have been interrogated with respect thereto for that reason, or they may have been regarded as of no importance,

or the circumstances may have been of a character which admitted of no further explanation, being in themselves such circumstances as the jury could ignore or draw such inferences therefrom as they thought proper. And yet the instruction was of a nature which permitted the jury to draw unfavorable inferences against the accused, because in the course of his examination he had not alluded to every fact and circumstance already in evidence, and given an explanation thereof consistent with his innocence. We are satisfied that the instruction cast an undue burden on the defendant, and that it was also misleading. Moreover, we are not able to say with certainty, as we must to uphold the verdict, that the defendant was not prejudiced by the instruction."

The instruction held erroneous in the case just cited, and the giving of which entitled the defendant to a new trial, was by no means so strong against the defendant there as is that against the defendant Diggs in which the jury was told:

"It is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so"

—in other words, that the law drew such an inference in respect to material testimony against him where he remained silent in regard to it. I think it clear that that instruction was erroneous and threw an illegal burden upon the defendant; it was omitted from the instructions given in the case of Caminetti, subsequently tried.

In the prevailing opinion in the present cases the court cites, as sustaining its holding that the trial judge was right in in-
576 structing the jury in the Diggs case that it was "a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so," the decisions of the Supreme Court in the cases of Reagan v. United States, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709, Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078, and Sawyer v. United States, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269. How very far those cases are from holding anything of the sort may be very clearly shown by making a brief reference to each of them. Thus:

The defendant in the case of Reagan v. United States, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709, was charged with the crime of smuggling, and took the stand as a witness in his own behalf. The Supreme Court, in considering the instruction of the trial court in respect to that matter, said:

"By the Act of March 16, 1878, c. 37, 20 Stat. 30, a defendant in a criminal case may, 'at his own request, but not otherwise, be a competent witness.' Under that statute it is a matter of choice whether he become a witness or not, and his failure to accept the privilege 'shall not create any presumption against him.' This forbids all comment in the presence of the jury upon his omission to testify. Wilson v. United States, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and

is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. It is unnecessary to consider whether, when offering himself as a witness as to one matter, he may, either at the will of the government or under the discretion of the court, be called upon to testify as to other matters. That question is not involved in this case, and we notice it simply to exclude it from the scope of our observations. The privileges and limitations to which we refer are those which inhere in the witness as a witness, and which affect the testimony voluntarily given. As to that he may be fully cross-examined.

It is thus seen that the Supreme Court there expressly declared that the question here involved was not involved in that case, and that it was mentioned only for the very purpose of excluding it from the scope of its observations in that case.

The case of Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, came before the court on an appeal from an order of the Circuit Court made upon a return of a writ of habeas corpus remanding the petitioner to the custody of the marshal, he having refused to answer a certain question as a witness before the grand jury in relation to a charge then under investigation by that body against certain officers and agents of a certain railway company for an alleged violation of the Interstate Commerce Act; and the question before the Supreme Court was whether the Act of Congress of February 11, 1893, c. 83, 27 Stat. 443 (Comp. St. 1913, § 8577), which enacts that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, * * * on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture," sufficiently satisfies the constitutional provision declaring that no person shall be compelled in any criminal case to be a witness against himself. The few lines quoted from the opinion in that case by the court in the present cases give, in my opinion, a very inadequate idea of what the Supreme Court held in Brown v. Walker, and in no respect sustain, as I view it, the ruling of the court below upon the question under consideration in the present cases.

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So in the case of Fitzpatrick v. United States, 178 U. S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078, the question here involved did not arise; the question there being one as to the extent to which cross-examination was proper where the defendant takes the stand in his own behalf—the court saying at page 315 of 178 U. S., at page 948 of 20 Sup. Ct. (44 L. Ed. 1078):

"Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf, and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt

can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defense, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury. State v. Ober, 52 N. H. 459 [13 Am. Rep. 88]. And it is also held in a large number of cases that, when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of State v. Lurch, 12 Or. 99 [6 Pac. 408], is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. State v. Saunders, 14 Or. 300 [12 Pac. 441], is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination."

There is here cited by the Supreme Court, with its apparent approval, a decision of the Supreme Court of Oregon to the effect that a defendant to a criminal case cannot be compelled to answer as to any facts not relevant to his direct examination. And, in the case of Sawyer v. United States, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269, what the Supreme Court held was that where a defendant takes the stand in his own behalf he waives his constitutional privilege of silence and the prosecution has the right to cross-examine him upon his evidence in chief with the
578 same latitude as though he were an ordinary witness as to circumstances connecting him with the crime; the court, at page 165 of 202 U. S., at page 579 of 26 Sup. Ct. (50 L. Ed. 972, 6 Ann. Cas. 269), saying:

"It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime. Fitzpatrick v. United States, 178 U. S. 304 [20 Sup. Ct. 944, 44 L. Ed. 1078]."

In each of the present cases there was a sharp conflict, as will be seen from the quotations already made between the testimony of the two women and that of Diggs upon the question as to whether the women were persuaded, induced, or coerced into taking the Reno trip. That conflict is further shown by additional testimony of Diggs, and by the testimony of Caminetti. The latter was not cross-examined at all, and his direct testimony was short and confined to matters also antedating the trip to Reno, and mainly to reported threats of publicity of the relations existing between Diggs, himself, and the women, and threats of arrest and personal violence, and concluded with these statements:

"I remember having been at the Peerless restaurant on Saturday afternoon, March 8, 1913. I saw Maury I. Diggs there at that time. There were different people there at different times. Miss Norris and Miss Warrington were not there all the time. They were there during part of the time. I had a conversation with Maury I. Diggs in the Peerless restaurant with reference to something his father had said to him while in San Francisco. The Peerless restaurant is in the city of Sacramento on Ninth street between K and L. Miss Warrington was there when I got there, and later on, just after I got there, Miss Norris came in. Mr. Diggs said: 'I have just come up from San Francisco, and my father is coming up Monday to have you and Lola and Marsha arrested. He claims that you and Lola and Marsha are as much responsible for the position in which I am in as I am, and that he is going to put you three through everything I have gone through.' He said: 'I tried to keep him from coming up, but I could not, and he will be up here to-morrow morning.' That is about the substance of what he said. He went over it and enlarged upon it. I replied: 'Then I am gone.' I meant that when Mr. Diggs got there to have me arrested that I would not be there, that I was going to get out of town. First Mr. Diggs said that if I went it would be necessary for him to go, and when he said that Miss Warrington said: I am going, too; I can't stay here if you leave.' And Lola—Miss Norris—said that she could not go, although she hated to stay in Sacramento and face things she thought or knew were going to happen, but she could not leave. Thereupon Miss Warrington turned around and said: 'Lola, I am going, and you have got to go, too.' I believed the statements made by Mr. Diggs to me as having come from his father were true. I had already had a talk with him over the phone in which he said the same things, and by the tone of his voice I knew that he was extremely angry with me at that time, and from what Mr. Diggs said I gathered that his anger had grown. I told Miss Norris and Miss Warrington and Maury I. Diggs of the conversation I had had with Mr. Lesley, to which I have testified. Prior to the conversation at the Peerless restaurant I told them about what Mr. Lesley had said."

Additional testimony of Diggs is as follows:

"I said to Marsha: 'That is enough; the juvenile officers are after us; my father is here to carry out his intentions, and I am going to

go. I am going to get out of this town for awhile. I am
579 going to go away from here; this is too hot for me.' Then Marsha said: 'Well, old boy, believe me, you're not going away and leave me here.' I said: 'Miss Warrington, you can do just as you please; but I am going to go away from here for awhile. I have too much to lose, and I have too good a family to bring trouble down on them, and I am going to go away.' She said: 'I am going too; you are not going away and leave me.' Thereupon Mr. Caminetti spoke up something about Miss Norris. Then she said: 'If Miss Norris doesn't want to go, I'll make her go; she has got to go away with me.' Miss Warrington said that about Miss Norris. * * * During the last week ending March 9th Miss Warrington and Miss Norris met me at the Columbia Hotel. They came up and seen me about 4 o'clock in the afternoon. I think that either Mr. Caminetti told them, or I told them, that I was there. I believe that I called Miss Warrington up. Miss Warrington came up there. It was in regard to our conditions. The specific arrangement was for all to come up there, whether it was on my suggestion or Mr. Caminetti's; I have forgotten which. I told her that I thoroughly and positively made up my mind to leave town. I said: 'I am going to Los Angeles for a week or two, and I have just got to go; that is all there is to it.' I was very much worried; in fact, I was scared to stick my nose out of that room. On that occasion I told her all about my business, all about my relations, and I told her that this thing was getting too much for me; that I had too much to lose, and had a good home, and a good wife, and too nice a child to take any chances. I said: 'Miss Warrington, we have to quit our going together; we have to cut it out; everybody is getting onto us.' She broke in and said: 'Yes you bet your life they're getting onto us; a friend of mine, who is a newspaper reporter, told me we were going to be written up in the Sacramento Bee.' I said: 'Who was it?' She said: 'Alfred Putnam.' I said: 'What did he say to you?' She said that he said that one of the editors had got wise to our actions and had an article all written up, and that he was going to run it, and was going to publish it immediately, but through his influence, and through his respect for my father, owing to the fact that they were both Masons, had got the article squelched, and got it stopped. I said: 'Are you sure they had an article?' She said: 'Why, positively, he told me it was all written up and he saw it.' I said: 'Don't you think that is a little grand stand play on Putnam's part?' and she said: 'No, sir; that is the truth.' I said: 'By jinks; that is getting pretty serious.' She said: 'Yes, I guess you have had about all you want of the Sacramento Bee, haven't you?' And I said: 'Yes, I had; that I didn't want to get into any tangle with them; that I didn't want them to ever write me up.' Then the conversation drifted on back into the fear that was overtaking the whole crowd. I thoroughly declared myself that I was going. Marsha said: 'Well, if you're going, I am going, too; you're not going to leave me here with the bag to hold and face all this trouble.' I said: 'Miss Warrington, you can do just exactly as you please about it; I don't intend to ask you to go, or ask you to stay

home; it is your business, and you can do as you please.' She said: 'Well, I am going.' Lola Norris said: 'I can't go. I am not going; my father is not feeling well, and it would break my mother's heart for me to go.' And Marsha said: 'Yes; and it will break my father's heart, too.' Somebody said something about her mother. She said: 'Well, I don't care about my mother; my mother and I don't get along anyhow.' Miss Warrington said she would like to go to spite her mother, her stepmother. Her aunt is her stepmother. She said her father had always been very good to her, and she liked her father, and didn't want to leave him. I said: 'That is up to you; you people can do as you please, but I am going to get out of here. That is final and positive. I am going. I don't care what the rest of you do—Mr. Caminetti, or any of you. I have too much to lose.' When Lola said it would break her mother's heart to go, Marsha said: 'Well, I can't help that; you've got to go with me; you've got to go along with me.' Lola, to my knowledge, did not say whether she was going or not. Then Mr. Caminetti spoke up, and he says these words very distinctly—He was sitting on the other side of the table. He says, 'Now, girls, I want to make myself understood right here;' he says, 'If Diggs is going, I am going;' and he says, 'If you people go with us, that is your business;' he says, 'Now, I don't want you girls to leave with the idea that you're going to get any great or glorious or glittering future; I want to go on record right here as saying that I don't want you to go; I would rather have you stay home here; I don't want to be bothered with women in this business, if Diggs and I are going to get arrested, and are trying to get away from arrest, we don't want to be hampered with women. I want to go on record right now as not persuading you girls to go, or asking you to go; on the other hand, if you are going to go, we would rather have you go in some other direction.' Marsha sat up and said: 'We are not going to go in any other direction; if you and Diggs are going, we will go with you; you can't leave us; if you leave us here, and leave us to go in another direction, we will never see you again; that will be the end of you; we will never see you again.'"

While there was testimony on the part of the government tending to show that both Diggs and Caminetti persuaded and induced the girls to go with them from Sacramento to Reno, there was on the part of both defendants testimony tending to show that neither of them did so, but, on the contrary, that their going was voluntary. If voluntary, the girls were necessarily accomplices with the men in the alleged violation of the act of Congress upon which the indictments are based, and could, as was expressly held by the Supreme Court February 1, 1915, in the case of United States v. Clara Holte, 236 U. S. 140, 35 Sup. Ct. 271, 59 L. Ed. —, have been indicted and prosecuted for having conspired with the men for a violation of the "White Slave Traffic Act."

Whether or not the testimony tending to show that the women were accomplices was true was, as a matter of course, like all other questions of fact, one for the exclusive determination of the jury under appropriate instructions. Based upon the view, however, that

the women were not accomplices of the men, the court below refused to give any of the instructions requested by the defendants upon the subject of accomplices, some of which correctly defined what constitutes an accomplice, and the proper caution and care with which the testimony of accomplices should be weighed and scrutinized by the jury, to which action of the court exceptions were duly taken by the defendants. In holding, as I do, that they should have been given, it is but fair to the learned judge of the court below to say that at the time the present cases were tried the decision of the Supreme Court in the case of United States v. Clara Holte, supra, had not been rendered.

While many of the states have statutes expressly providing that no one can be convicted of a crime upon the testimony of an accomplice without some corroboration of his testimony, there is no such statute of the United States, and while, therefore, it is not essential in the federal courts, as it is in the courts of such states, to a conviction upon the testimony of an accomplice that such testimony be corroborated, it is proper and generally recognized as the duty of the courts in all such cases to explain to the jury the nature of such testimony, and to caution them to scrutinize and weigh it with great care. Such general rule is thus stated in Greenleaf on Evidence (16th Ed.) §§ 380 and 381:

"§ 380. The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the
581 province of the jury. It has sometimes been said that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law: it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice, without any confirmation of his statement. But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone and without corroboration; and it is now so generally the practice to give them such advice that its omission would be regarded as an omission of duty on the part of the judge. And considering the respect always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner in any case of felony upon the sole and uncorroborated testimony of an accomplice. The judges do not, in such cases, withdraw the cause from the jury by positive direction to acquit, but only advise them not to give credit to the testimony.

"§ 381. But though it is thus the settled practice, in cases of felony, to require other evidence in corroboration of that of an accomplice, yet, in regard to the manner and extent of the corroboration to be required, learned judges are not perfectly agreed. Some have deemed it sufficient, if the witness is confirmed in any material part of the case; others have required confirmatory evidence as to the corpus delicti only; and others have thought it essential that there should be corroborating proof that the prisoner actually participated in the offense, and that, when several prisoners are to be tried, con-

firmation is to be required as to all of them before all can be safely convicted—the confirmation of the witness, as to the commission of the crime, being regarded as no confirmation at all, as it respects the prisoner; for, in describing the circumstances of the offense, he may have no inducement to speak falsely, but may have every motive to declare the truth, if he intends to be believed, when he afterwards fixes the crime upon the prisoner. If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if there was but one."

The case of Bennett v. United States, 227 U. S. 333, 33 Sup. Ct. 333, 57 L. Ed. 531, was based upon the same act of Congress as the present cases, the White Slave Traffic Act of June 25, 1910; and it seems from the opinion of the court that, like the cases here, two women were involved in that alleged unlawful transaction, one Opal Clarke, and the other Ella Parks. The defendant there was indicted for having caused the illegal transportation of Opal Clarke, and in considering the objection to one of the instructions upon the question of corroborating the testimony of one of the women the Supreme Court said:

"The basis of this contention is that Opal Clarke was the accomplice of defendant as to Ella Parks, and that hence the court erred in its instructions to the jury in regard to the extent of the corroboration Opal Clarke's testimony had received. The instruction complained of submitted to the jury the fact, and warned against a conviction upon the uncorroborated testimony of an accomplice, and said: 'Necessarily, if you find that she was an accomplice with respect to these charges, or any of them, you will then necessarily have to inquire into the facts as to whether or not there is corroborating testimony. There is evidence tending to corroborate her testimony, and it is for you to consider its force and value and the weight to give to it.' The contention is that this was error, 'as the court instructed the jury that there was corroborating evidence, when the court should have charged the jury that it was for them to ascertain from the testimony whether or not there was corroborating testimony.' The objection is hypercritical. The court did not instruct the jury that there was corroborating testimony, but testimony of that tendency, and added that the force and weight of its corroborating power was for the jury to determine."

582 In Blashfield on Instructions to Juries, pp. 484, 485, it is said:

"Except in one state, it seems to be the well-settled and almost universal practice for the court to instruct that the testimony of accomplices should be viewed by the jury with great care and caution. It has been held, however, that, in the absence of a request, failure to give such instruction cannot be assigned as error. There is some diversity of opinion as to whether a refusal to give an instruction of this nature, when requested, will be ground for reversal. There are rulings both ways on this point"—citing a large number of cases.

In the case of United States v. Ybanez (C. C.) 53 Fed. 536, 540, the court, in speaking of the defendants there said:

"Some of them are, by their own statements, clearly accomplices, while at least two others claim that they were captured by Garza's men, and were compelled to join the expedition under the pressure of force and threats of violence. If any of the witnesses testifying in the case were constrained or compelled to go with, and remain in, the expedition, because of violence, or threats of violence, offered to them by men engaged in the enterprise; that is, if they did not join and remain with the expedition voluntarily, but were compelled to do so by men engaged therein, then they would not be regarded, in law, as accomplices, for an accomplice is a voluntary assistant in a crime. 'He is a person who knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense.' Bearing in mind this distinction between a person who is an accomplice and one who is not, you are further instructed that whether the testimony of an accomplice be true or false is a question which, like all controverted questions of fact, is submitted solely to you to determine for yourselves. It is not within the province of the court to pass upon controverted questions of fact, or upon questions affecting the credibility of witnesses. But it is the duty of the court to call your attention to certain rules which obtain in courts of justice in reference to these persons known in law as 'accomplices.' On this point you are instructed 'that a particeps criminis—that is, an accomplice—notwithstanding the turpitude of his conduct, is not on that account an incompetent witness.' It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the government has the right to use him as a witness. It is the duty of the court to admit his testimony, and that of the jury to consider it. The testimony of an accomplice is, however, always to be received with caution, and weighed and scrutinized with great care by the jury; and it is usual for courts to instruct juries—and you are so instructed in this case—not to regard the evidence of an accomplice unless he is confirmed and corroborated in some material parts of his evidence connecting the defendant with the crime, by unimpeachable testimony. But you are not to understand by this that he is to be believed only in such parts as are thus confirmed, which would be virtually to exclude him, inasmuch as the confirmatory evidence proves, of itself, those parts it applies to. If he is confirmed in material parts connecting the defendant on trial with the offenses charged in the indictment, he may be credited in others; and the jury will decide how far they will believe a witness, from the confirmation he receives by other evidence, from the nature, probability, and consistency of his story, from his manner of delivering it, and the ordinary circumstances which impress the mind with its truth. U. S. v. Kessler, Baldw. 22 [Fed. Cas. No. 15,528]; U. S. v. Reeves [C. C.] 38 Fed. 409, 410. With the rules above announced for your guidance, you will give to the testimony of such witnesses as have been shown to be accomplices such weight as you consider it entitled to receive."

In the case of United States v. Van Leuven (D. C.) 65 Fed. 78, 81, Shiras, District Judge, said:

"At the common-law, as the same existed in England, in the progress and development of that law the conclusion was reached by the judges charged with the duty of presiding over trials
583 of criminal cases that it was unwise for a jury to convict a person upon the uncorroborated testimony of an accomplice, and therefore judges cautioned the juries in this particular, and charged them that it was unwise for the jury to convict upon the uncorroborated testimony of an accomplice. In the state of Iowa it has been enacted as a provision of statutory law that no person shall be convicted of a crime upon the uncorroborated testimony of an accomplice, but there must be corroborative testimony tending to connect the defendant with the commission of the offense. I have always deemed it my duty as a judge of a court of the United States, and trying cases arising in the state of Iowa, and where the defendant is a citizen of this state, to say to the jury that they cannot convict upon the uncorroborated testimony of an accomplice; and when a case stands before a jury on that kind of evidence alone I assume the duty of charging them to return a verdict of not guilty, but, if the testimony of an accomplice is accompanied by evidence tending to corroborate the same in its material statements, then it is the duty of the court to submit the whole to the jury, and it is for the jury to determine whether the corroborating evidence is of such a character and weight as justifies the jury in giving weight to the testimony of the accomplice."

The state of California has a statute similar to the statute of Iowa referred to in the last-cited case. But here we are not called upon to consider whether the federal courts in California should go to the extent indicated in the opinion in that case. I am, however, clearly of the opinion that the testimony in the present cases was such as to entitle the defendants to an instruction explaining to the jury what constituted an accomplice, and the care and caution with which the testimony of accomplices should be weighed and scrutinized, especially in view of the circumstances under which these trials took place, and of at least one circumstance occurring during the trial, which, however, need not be specifically referred to, since there is to be no other trial; for if it be true, as some of the testimony undoubtedly tends to show, that the women went voluntarily with the men in interstate commerce for the purposes stated in the indictments, they were manifestly accomplices with them in the violation of the White Slave Traffic Act, and might have been indicted, prosecuted, and punished as conspirators under the provisions of the United States Penal Code of March 4, 1909, c. 350, § 37, as was expressly decided by the Supreme Court in the very late case of United States v. Clara Holte, already cited.

In the case of Crawford v. United States, 212 U. S. 183, 204, 29 Sup. Ct. 260, 268 (53 L. Ed. 465, 15 Ann. Cas. 392) the Supreme Court, in speaking of the testimony of an accomplice—one Lorenz—said:

"But the evidence of a witness, situated as was Lorenz, is not to

be taken as that of an ordinary witness, of good character, in a case whose testimony is generally and prima facie supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. In many jurisdictions such a man is an incompetent witness unless he has been pardoned. The facts surrounding this case make it particularly important that the rule in regard to material errors should be most rigidly adhered to. If it be not clear that no harm could have resulted from the commission of this material error, the judgment should be reversed."

And in the very recent case of Lung v. United States, decided by this court January 4, 1915, 218 Fed. 817, —— C. C. A. ——, we pointed out, as has been above shown, that while in the federal courts the testimony of a confessed accomplice need not be corroborated to support a conviction, such testimony should be received with suspicion and with the greatest care and caution, and not taken as that of an ordinary witness of good character, generally and prima facie supposed to be true, and that, in the case then under consideration, the instructions of the trial court not being contained in the record, and there being no complaint in respect to them, the presumption was that the jury was so instructed.

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For the reasons stated, I think that in each case the judgment should be reversed, and the case remanded for a new trial.

* * * * * * *

In the Supreme Court of the United States, October Term, 1914.

No. —.

F. DREW CAMINETTI, Petitioner,
v.
UNITED STATES OF AMERICA.

Stipulation.

In order to relieve the court from the necessity of examining much irrelevant matter contained in the voluminous record in this case, only a small portion of which is pertinent to a petition for a writ of certiorari, it is hereby stipulated by and between counsel for the parties that only the portions thereof indicated below shall be printed for the present consideration of the court; counsel for the respondent, however, reserving the right to require any additional matter to be printed which may be deemed necessary.

JOSEPH W. BAILEY,
Counsel for Petitioner.
JNO. W. DAVIS,
Solicitor General.

May 28, 1915.

Portions of record to be printed:
The matter attached hereto.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which F. Drew Caminetti is plaintiff in error and The United States of America is defendant in error, No. 2405, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirteenth day of July, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 24,752. Supreme Court of the United States, No. 480, October Term, 1915. F. Drew Caminetti vs. The United States. Writ of Certiorari. Docketed No. 2405. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 3, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit.

In the Supreme Court of the United States, October Term, 1915.

No. 480.

F. DREW CAMINETTI, Petitioner,
v.
THE UNITED STATES.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the [illegible]s to the above-entitled cause that the certified transcript of t[illegible]d now on file in the office of the Clerk of the Supreme Cou[illegible]ited States shall constitute the return of the Clerk of [illegible]tes Circuit Court of Appeals for the Ninth Circui[illegible]f certiorari granted herein.

(Signed) JO[illegible] W. BAILEY,
Counsel for Petitioner.

(Signed) JNO. W. DAVIS,
Solicitor General.

H.

July 19, 1915.

[Endorsed:] Stipulation as to Return to Writ of Certiorari. Filed August 3, 1915. F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2405.

F. DREW CAMINETTI, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from Supreme Court U. S.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding page, to be a full, true, and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above-entitled cause on the 3rd day of August, A. D. 1915, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 3rd day of August, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk United States Circuit Court of Appeals for the Ninth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Aug. 3, 1915. F. D. M., Clerk.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2405.

F. DREW CAMINETTI, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ and send to the said Supreme Court a certified copy of a Stipulation, entered into by and between the attorneys of record, that the certified copy of the record now on file in said cause in the said Supreme Court shall constitute the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 3d day of August, A. D. 1915.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 3d day of August, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Aug. 3, 1915. F. D. M., Clerk.]

[Endorsed:] 24,752. File No. 24,762. Supreme Court of the United States. No. 480, October Term, 1915. F. Drew Caminetti vs. The United States. Return to Writ of Certiorari. J. W. Bailey, Marshall B. Woodworth, Robert T. Devlin, Attorneys for Petitioner.

[Endorsed:] File No. 24,752. Supreme Court U. S. October Term, 1915. Term No. 480. F. Drew Caminetti, Petitioner, vs. The United States. Writ of certiorari and return. Filed September 18, 1915.

Office Supreme Court, U. S.
FILED
MAY 29 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916

No. 139

F. DREW CAMINETTI

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI.

J. W. BAILEY,
MARSHALL B. WOODWORTH,
ROBERT T. DEVLIN,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. .

F. DREW CAMINETTI

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES FOR ITS REVISION AND DETERMINATION THE APPEAL TAKEN BY F. DREW CAMINETTI IN THE ABOVE-ENTITLED CAUSE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of F. Drew Caminetti respectfully represents:

1. That the petitioner is a citizen of the United States and a resident of the State of California.

2. That petitioner was indicted in the District Court of the United States in and for the Northern District of Cali-

fornia (First Division) for a violation of the act of Congress of June 25, 1910 (36 Stat., 825), known as the "White Slave Traffic Act." The indictment contained four counts.

The first count of the indictment (the only count upon which the defendant was convicted) charged him with having, on the 15th of January, 1913, knowingly, feloniously, and unlawfully transported and caused to be transported, and with having aided and assisted in obtaining transportation for, and in transporting in interstate commerce, one Lola Norris from Sacramento, in the State and Northern District of California, to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific Company, for the purpose of debauchery and for an immoral purpose, to wit, that the said Lola Norris should be and become the concubine and mistress of the defendant Caminetti. (See indictment, Transcript of Record, p. 2.)

The second count charged a similar offense as to one Marsha Warrington, there being, however, this difference: that the immoral purpose alleged was that the said Marsha Warrington should be and become the concubine and mistress not of the defendant Caminetti, but of one Maury I. Diggs.

The third count charged the defendant with having persuaded, induced, and enticed Lola Norris; and count four charged him with having persuaded, induced, and enticed Marsha Warrington, respectively, to go from Sacramento, Cal., to Reno, Nev., for an immoral purpose, to wit, that the said Lola Norris should become the concubine and mistress of the defendant, and the said Marsha Warrington should become the concubine and mistress of one Maury I. Diggs.

The defendant was acquitted on the second, third, and fourth counts and was convicted only on the first count, the jury thus finding, in necessary effect, that the departure from Sacramento, Cal., of Lola Norris and Marsha Warrington with the defendant Caminetti and Maury I.

Diggs was voluntary on their part and not through any persuasion, inducement, or enticement on the part of the defendant.

3. Your petitioner respectfully shows that the court erred in holding that he could be properly convicted of the offense charged against him in the first count of the indictment upon testimony which clearly established that he did not transport Lola Norris in interstate commerce for the purpose of having her become a prostitute or with the intention of deriving any profit from her prostitution or debauchery.

This question was raised by assignments of errors numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 17. (See motion to instruct the jury to acquit; also motion in arrest of judgment, Transcript of Record, pp. 30-33, 45, 46, 47, 48, 412-414.)

4. Your petitioner further shows that the court erred in charging, over the objection of defendant's counsel, the jury as follows:

> "Where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence" (Transcript of Record, p. 445).

5. Your petitioner further shows that the court erred in refusing to instruct the jury as to the testimony of accomplices, for Marsha Warrington and Lola Norris, upon whose testimony almost entirely the defendant was convicted, were clearly accomplices, if any crime was committed (Transcript of Record, pp. 99, 446, 449, 450; assignments of error, pp. 155, 156, and 157).

ARGUMENT.

I.

THE WHITE SLAVE TRAFFIC ACT DOES NOT APPLY TO CASES WHICH INVOLVE A MERE IMMORALITY AND HAVE NO ELEMENT OF COMMERCE OR COERCION.

It is not contended by the prosecution that Lola Norris, for whose transportation in interstate commerce petitioner was convicted, was transported against her will or for the purpose of profiting by her prostitution or debauchery. The offense was plainly and only one of fornication or adultery, and the case, therefore, distinctly presents the question of whether the "White Slave Traffic Act" applies, or was intended to apply, to such a state of facts. The testimony of Lola Norris completely negatives the idea of commerce or coercion. She testified as follows:

> "Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired Miss Warrington to go from Sacramenta to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody" (Transcript of Record, pp. 309, 310).

The testimony of the defendant himself is to the same effect (Transcript of Record, pp. 402-407).

Considering the penalties provided in the "White Slave Traffic Act," this court would not be warranted in holding that it applies to cases of mere immorality, unless the language of it clearly requires such a construction, because it cannot be supposed that any enlightened legislative assembly would declare an act of mere immorality a felony and authorize a court to punish the guilty man (or the guilty woman, for under a recent decision of this court the woman may be as guilty as the man) by an imprisonment for five years and a fine of five thousand dollars. I understand, of course, that if Congress possesses the power to punish an offense, it can prescribe any penalty it chooses, provided only that it stops short of inflicting a cruel or an unusual punishment; but an intention to punish as felonious acts which are mere misdemeanors in practically all of the States cannot be imputed to Congress in the absence of language which clearly imports such an intention.

Without detaining the court with an attempt to analyze the language of the statute, I think its true meaning can be deduced from its last section, which expressly declares that:

> "SEC. 8. That this act shall be known and referred to as the 'White Slave Traffic Act.'"

It is very unusual for Congress to include in any act such a declaration, and there could have been no other purpose in departing from the legislative method of leaving every act to speak for itself, except that Congress desired to indicate the character of offenses which it was denouncing as felonies and for the commission of which it was prescribing such drastic punishment.

If the eighth and last section of the act should leave any doubt in our minds that it was directed only against the interstate transportation of women where an element of white slavery or traffic existed, then I think that doubt will be entirely removed by an examination of the committee report to the House of Representatives recom-

mending the passage of the bill which became the law. I understand, of course, that in construing a law of Congress this court does not consider what was said in debate by individual members of Congress; but a different rule prevails with respect to the title of an act and with respect to the report of a committee, for this court has said in more than one case that it will consider the title of an act and will consult the report of a committee in order to illuminate the meaning of a statute.

Holy Trinity Church *vs.* United States, 143 U. S., 457.

Coosaw Mining Company *vs.* South Carolina, 144 U. S., 536.

Binns *vs.* United States, 194 U. S., 486.

The report made by Representative Mann, who is the author of the "White Slave Traffic Act," and by whose name it is generally known, states the purpose of it so clearly that I venture to quote the following:

> "A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution."
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> * * * * * * *
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> "Investigations conducted by Government agents disclose the fact that a national and international traffic exists in the buying, selling, and exploitation of women and young girls for immoral purposes. This traffic has come to be known the world over as 'the

white-slave trade.' It is referred to by the Paris conference as 'the trade in white women.' ",

"There are few who really understand the true significance of the term 'white-slave trade.' Most of those who have given only a casual thought to the subject have the impression that women who lead immoral lives in public houses are there voluntarily, either because they are attracted by the excitement of such a life or because they have found it an easy way to earn a living. In many cases such is not the fact. The result of careful investigation into this subject discloses the fact that the inmates of many houses of ill-fame are made up largely of women and girls whose original entry into a life of immorality was brought about by men who are in the business of procuring women for that purpose—men whose sole means of livelihood is the money received from the sale and exploitation of women who, by means of force and restraint, compel their victims to practice prostitution. These investigations have disclosed the further fact that these women are practically slaves in the true sense of the word; that many of them are kept in houses of ill-fame against their will; and that force, if necessary, is used to deprive them of their liberty."

"The characteristic which distinguishes 'the white-slave trade' from immorality in general is that the women who are the victims of the traffic are unwillingly forced to practice prostitution. The term 'white slave' includes only those women and girls who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude; those who practice prostitution as a result of the activities of the procurer, and who, for a considerable period at least, continue to lead their degraded lives because of the power exercised over them by their owners. In short, the white-slave trade may be said to be the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes."

II.

IF THE "WHITE SLAVE TRAFFIC ACT" APPLIES, AND WAS INTENDED TO APPLY, TO CASES WHICH ARE FREE FROM COMMERCE OR COERCION AND INVOLVE NO MORE THAN FORNICATION OR ADULTERY, THEN IT IS VOID, BECAUSE IT IS NOT WITHIN THE CONSTITUTIONAL POWER OF CONGRESS TO PROHIBIT AND PUNISH SUCH ACTS.

I do not doubt the power of Congress to prohibit interstate traffic in prostitutes any more than I doubt the power of Congress to prohibit the interstate shipment of diseased meat; but that power is derived from the commerce clause of the Constitution and cannot be exercised except in the regulation of commerce. If men are base enough to traffic in the bodies of women, then such traffic is undoubtedly commerce as much as the traffic in articles of manufacture or agriculture, and is equally subject to the power of Congress; but immorality is not commerce, and no matter how much we may abhor moral delinquency it is subject to State, and not to Federal, control.

I am not unmindful that this court has held that Congress, under the commerce clause of the Constitution, may regulate the interstate transportation of persons, and I do not challenge the soundness of that holding. I accept the view that commerce includes more than traffic, extending to instrumentalities and to intercourse; but those expressions must be construed as relating to commerce. Conceding that under its power to regulate commerce Congress can prescribe the charges for transportation and regulate the carrier in other ways, and can even control the passengers themselves to an extent, those regulations, in order to be valid, must still be regulations of commerce and not regulations of personal conduct which does not interfere with commerce and is objectionable only for its immorality.

III.

While it is true that an accused person who voluntarily takes the stand may be subjected to a cross-examination as other witnesses, and certainly as to the matters upon which he has testified on direct examination, it was a reversible error for the court to charge the jury in this case that they had a right to consider "the defendant's failure to deny or explain acts of an incriminating nature that the evidence of the prosecution tended to establish against him."

I shall not burden the court with an argument on that question, because I think it is sufficient to say that the Circuit Court of Appeals for the Ninth Circuit has, in the case under consideration, decided it one way, while the Circuit Court of Appeals for the First Circuit, Myrick *vs.* U. S., 219 Fed., 1, and the Circuit Court of Appeals for the Eighth Circuit, Balliet *vs.* U. S., 129 Fed., 689, have decided it another way, and this conflict on a question involving a constitutional right is sufficient to warrant this court in granting a writ of certiorari in order to remove the conflict between those Circuit Courts of Appeals, even if there were no other question in the case.

Conclusion.

All of the foregoing considered, your petitioner respectfully prays that a writ of certiorari shall be issued, as provided by law and by the rules of this honorable court, directed to the Circuit Court of Appeals for the Ninth Circuit, and commanding said court to certify and send to this court a complete transcript of the record in this case, to the end that the said case may be reviewed and the judgment reversed.

Respectfully submitted,

J. W. BAILEY,
MARSHALL B. WOODWORTH,
ROBERT T. DEVLIN,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA,
City of Washington, ss:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and believe that it is well founded, and that it is not presented for the purpose of delay.

J. W. BAILEY,
Attorney for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. —.

F. DREW CAMINETTI
vs.
THE UNITED STATES OF AMERICA.

Hon. JOHN W. DAVIS,
Solicitor General of the United States:

Notice is hereby given that we shall, on Tuesday, the 1st day of June, A. D. 1915, at the opening of court on that day, or as soon thereafter as counsel can be heard, submit the petition, copy of which is hereby served upon you, to the Supreme Court of the United States.

J. W. BAILEY,
MARSHALL B. WOODWORTH,
ROBERT T. DEVLIN,
Attorneys for Petitioner.

Service accepted this..... day of May, A. D. 1915.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. [redacted] 139

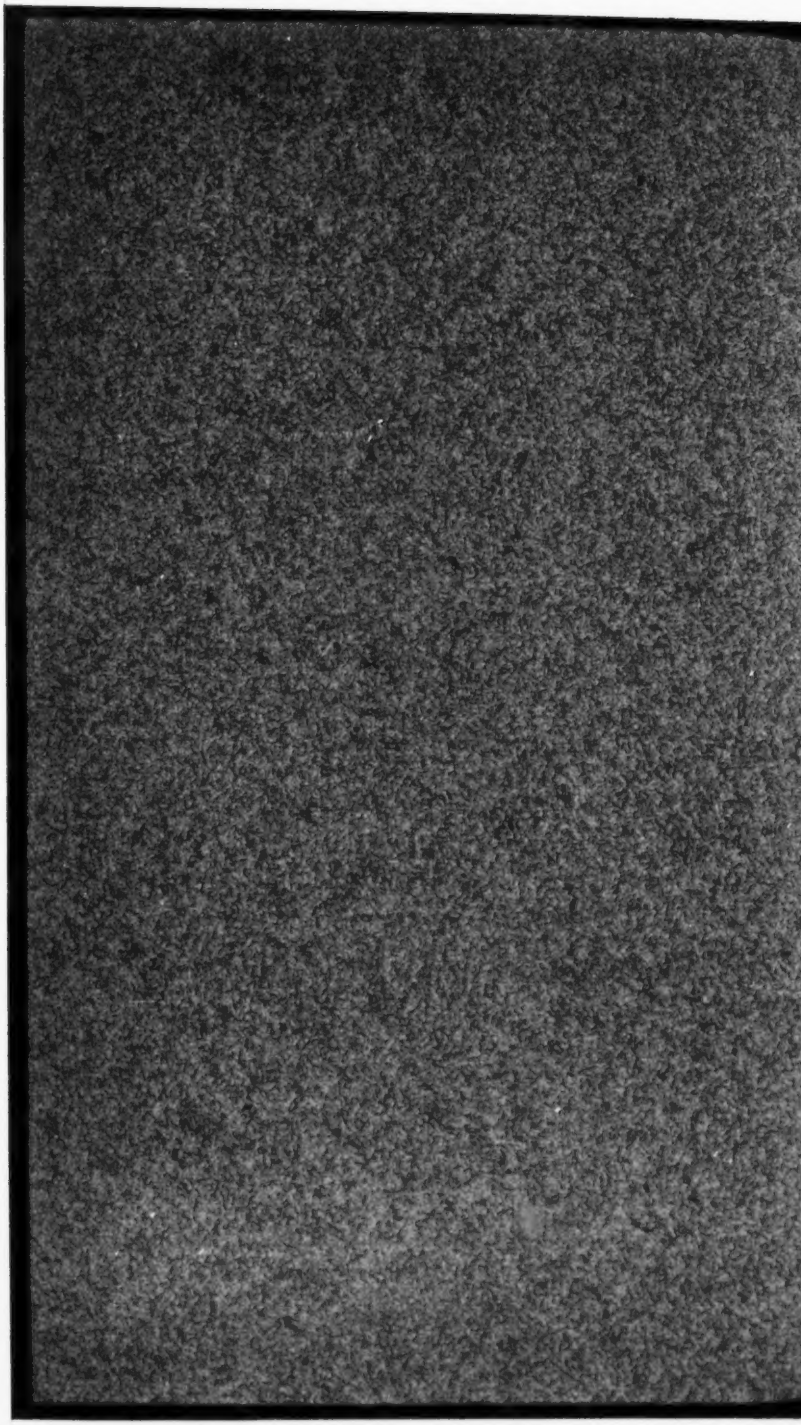
F. DREW CAMERETTI

v.

THE UNITED STATES OF AMERICA.

MOTION FOR A REHEARING.

J. W. BAILEY,
Attorney for Petitioner.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 1008.

F. DREW CAMINETTI, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

MOTION FOR A REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that this honorable court will reconsider its action denying his application for a writ of certiorari and grant the same for the following reasons:

1. Unless and until this court decides whether the "White Slave Traffic Act" applies to cases which involve a mere immorality, without any element of commerce or coercion, there cannot be any uniform enforcement of that law; because in some districts the United States attorneys, holding that the law applies to such cases, prosecute them, while in other districts the United States attorneys, under a

different view of the law, refuse to prosecute cases except where there is commerce or coercion. The Department of Justice has heretofore specifically expressed the opinion that cases involving no element of commerce are not within the law, and approved a refusal to prosecute a case of mere immorality, as will appear from the following correspondence between the Hon. George W. Wickersham and the Hon. Charles C. Houpt:

"DEPARTMENT OF JUSTICE,
"OFFICE OF UNITED STATES ATTORNEY,
"DISTRICT OF MINNESOTA,
"ST. PAUL, July 7, 1912.

"THE ATTORNEY GENERAL,
"*Washington, D. C.*

"SIR: I have the honor to submit for your direction and advice the facts in a case which is claimed to come within the purview of the Act of June 25, 1910, called the 'White Slave Traffic Act.'

"One Ada Cox, twenty-four years of age, residing at Chicago, Ill., came to St. Paul in October, 1910, at the solicitation and expense of one Rufas Edwards. On her arrival here, Edwards met her at the station. They passed the day riding, lunching and drinking, and the night following at a house of assignation in the city of Minneapolis. She remained there three days with Edwards and then returned to Chicago. In June, 1911, she repeated the visit under like circumstances.

"June 12, 1912, Miss Cox applied to me for a warrant of arrest of Edwards under the above-named act. At that time she made a statement of her connection with Edwards which was taken in shorthand by Mr. J. M. Dickey, Assistant United States Attorney, in his office, and by him written out.

"A copy of this statement is enclosed.

"Careful consideration of the facts and circumstances as related by Miss Cox fail to convince me that her case came within the spirit and intent of the Mann Act. *The element of traffic is entirely absent from this transaction.* It is not a case of

prostitution or debauchery and the general words 'or other immoral practice,' should be qualified by the particular preceding words and be read in the light of the rule of *Ejusdem Generis*. This view of the statute is the more reasonable when considered in connection with section 8 where Congress employs the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practices connected with the degradation of women for gain.

"Since I have hesitated about having a warrant issued for the arrest of Edwards, Miss Cox has *enlisted certain club women in her behalf who are insisting on the arrest being made.*

"As this case is typical of many others that are liable to be brought to this office I deemed it proper to submit the facts to ascertain if my interpretation of the statute is in harmony with the departmental construction.

"Very respectfully yours,

"(Signed) CHAS. C. HOUPT,
"United States Attorney."

"DEPARTMENT OF JUSTICE,
"WASHINGTON, D. C., July 23, 1912.

"UNITED STATES ATTORNEY,
St. Paul Minn.:

"I have received your letter of the 17th instant concerning a statement of the facts with reference to the complaint of one Ada Cox, against one Rufas Edwards of an alleged violation of the White Slave Traffic Act.

"I agree with your conclusion that the facts and circumstances set forth in your letter and its enclosures do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the Federal courts unless other and different facts are presented to you.

"Respectfully,

"(Signed) GEO. W. WICKERSHAM,
"Attorney General."

2. It is held by some district courts of the United States that the law applies to cases involving acts of mere immorality, while in other district courts of the United States it is held that the law applies only to cases in which there is an element of commerce or coercion.

3. It is inconceivable that Congress would include acts of mere immorality in a law the purpose of which was to punish the infamous and degrading business of trafficking in the bodies of women. The offenses are so different that it cannot be fairly assumed that Congress intended to classify the man who commits a mere moral delinquency with the man who engages in the sale of women for the sake of profit. Nor can it be assumed that Congress intended to subject the man who commits a sin to the same punishment as the man who commits a crime.

4. It could not be that Congress intended to punish an act of mere immorality in the manner provided by the "White Slave Traffic Act," because to assume that is to impute to Congress a disregard of that fundamental principle of criminal jurisprudence which admonishes legislators always to apportion punishments according to the gravity of offenses.

5. Any law which condemns a young man who commits an indiscretion to carry through life the brand of a felon, and inflicts upon his family the disgrace of his penitentiary service, is a reproach to our civilization, and no law of Congress should be construed to require such a punishment for such an act, unless its language does not admit of any other construction.

I know that this court never decides any question without a due consideration, and I also know that, after having given a question due consideration, it is not probable that any

reason so controlling as to induce a reversal of its judgment can be advanced on a motion for a rehearing. I venture to believe, however, that a decision on the question as to whether this "White Slave Traffic Act" applies to cases of a mere immorality is so important as to justify me in urging upon this court a second time to grant this petition for a writ of certiorari.

In no way, except through the judgment of this court, can the doubt which exists in the minds of the bar, or the differences which exist between the judges and prosecuting attorneys, be removed. With a decision by this court, whether it shall be one way or the other, the law will be uniformly and impartially enforced in every jurisdiction, thus rescuing our system from the reproach that what is a crime in one district may not be a crime in an adjoining district. With the question authoritatively decided by this court, then the prohibitions and penalties of the law will be understood and applied in all places and to all men alike. Surely to accomplish such a result is a sufficient reason for granting this petition for a writ of certiorari.

Respectfully submitted,

J. W. BAILEY,
Attorney for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

F. DREW CAMINETTI, PETITIONER,
v.
THE UNITED STATES. } No. 480.

MAURY I. DIGGS, PETITIONER,
v.
THE UNITED STATES. } No. 510.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled causes for joint hearing on a day convenient to the court at the next term.

Petitioners were convicted in the District Court of the United States for the Northern District of California, upon separate indictments and at separate trials, of violating the "White-Slave Traffic Act," 36 Stat. 825. Petitioner Caminetti was sentenced to eighteen months' imprisonment and to pay a fine of $1,500; petitioner Diggs was sentenced to two years' imprisonment and to pay a fine of $2,000. Separate

writs of error were sued out from the Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of the District Court (220 Fed. 545, 584). The cases are here upon writs of *certiorari* allowed by this court during the latter part of the last term, and petitioners are now at large on bail.

The cases arise out of the same transaction, involve similar questions, and for that reason were disposed of by the Circuit Court of Appeals for the Ninth Circuit in a single opinion, one of the concurring judges, however, subsequently filing a special concurring opinion. Upon certain matters involved there is a conflict of decision between different Circuit Courts of Appeals, and for that reason an early determination of the same by this court is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

APRIL, 1916.

O

House Calendar No. 11.

61st Congress, 2d Session. HOUSE OF REPRESENTATIVES. Report No. 47.

WHITE SLAVE TRAFFIC.

DECEMBER 21, 1909.—Referred to the House Calendar and ordered to be printed.

Mr. MANN, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT.

[To accompany H. R. 12315.]

The Committee on Interstate and Foreign Commerce, to which was referred the bill (H. R. 12315) to regulate and prevent the transportation in interstate and foreign commerce of alien women and girls for immoral purposes, and for other purposes, begs leave to report the bill back, with sundry amendments, with a recommendation that the amendments be agreed to and the bill as amended do pass.

The following amendments to the bill are recommended:

On page 2, line 9, strike out the words "or evidence of the right to" and insert after the word "transportation," in line 10, the words "or evidence of the right thereto."

On page 5, in line 7, after the word "procuration" insert the word "of."

On page 6, in line 16, strike out the word "and" and insert the word "or."

On page 7, lines 2 and 3, strike out the word "conclusively." Page 7, in line 7, after the word "include" insert the words "the District of Alaska." Page 7, line 9, strike out the word "impart" and insert in lieu thereof the word "import."

Amend the title so that it will read as follows: "A bill to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes."

POLICE POWERS OF THE STATES NOT INTERFERED WITH.

It is not the purpose of the bill to interfere with or usurp in any way the police powers of the States. The bill reported does not endeavor to regulate, prohibit, or punish, prostitution or the keeping of places where prostitution is indulged in. The prohibition of prostitution and other immoral practices and the punishment of the practice of prostitution or the keeping of houses of ill-fame, or other

immoral places, in the several States, are matters wholly within the powers of the States and the Federal Government has no jurisdiction over those subjects. On the other hand, it has been shown in the investigation relating to the "white slave traffic" that persons engaged in that business in some of the large cities felt quite free to engage in the traffic as between the States, when they hesitated about engaging in the traffic wholly confined to one State.

PROVISIONS OF THE BILL.

Most of the provisions of the bill are based upon the power of Congress over interstate and foreign commerce. In the second section of the bill it is made a crime for anyone to knowingly transport in interstate or foreign commerce any woman or girl for the purpose of prostitution, or for the purpose of inducing, enticing, or compelling a woman to become a prostitute; and in the same section it is also made a crime for anyone to knowingly procure a ticket to be used by a woman in interstate or foreign commerce going to a place for the purpose of prostitution, whereby such woman shall be actually transported in interstate or foreign commerce, or in any Territory, or the District of Columbia.

Section 3 of the bill makes it a crime for any person to knowingly persuade, induce, entice, or coerce any woman or girl to go from one State to another for the purpose of prostitution, and who shall thereby knowingly cause such woman to go or be transported as a passenger upon the line of any common carrier in interstate or foreign commerce.

Section 4 applies only to a girl under the age of 18 years, and is practically the same as section 3, except that it makes a higher penalty apply to the crime of leading a girl under 18 to become a prostitute and transporting her in interstate commerce for that purpose. The provisions of section 2 of the bill make the crime, first, to knowingly transport, and, second, to knowingly furnish a passenger ticket for transportation for the purpose of prostitution, when accompanied by the use of such ticket in interstate or foreign commerce. Section 3 makes the crime to knowingly persuade, induce, entice, or coerce a woman into prostitution, and thereby cause her to go and to be carried or transported as a passenger in interstate or foreign commerce.

DISTRICT OF COLUMBIA AND THE TERRITORIES.

All of the provisions which make the crime depend upon transportation in interstate or foreign commerce are made applicable to the District of Columbia, the Territories and possessions of the United States, including the Panama Canal Zone, without regard to the crossing of district, territorial, or state lines, and apply within the territories to the same extent as they apply in cases outside of the territories in interstate or foreign commerce.

PENALTIES.

The penalties provided by the bill are a fine of not more than $5,000 and imprisonment for not more than five years, except that the penalty where the girl is under 18 years of ago is not to exceed

$10,000 fine and imprisonment not to exceed ten years; and it is provided that prosecution may be in any district where the violation was committed, or from, through, or into which the woman is carried contrary to the provisions of law.

INTERNATIONAL AGREEMENT.

Section 6 of the bill is based in part upon the right of Congress to regulate foreign commerce and in part upon the right to legislate in furtherance of an international treaty. The United States in 1908 became a party to an international agreement for the suppression of the white slave traffic, and section 6 makes certain provisions to aid in carrying out by the United States the international agreement. It provides that the Commissioner-General of Immigration is designated to receive and centralize information concerning the procuration of alien women with a view to their debauchery, to receive their declarations, establish their identity, ascertain from them who induced them to leave their native countries, and to exercise supervision over them. It also provides that every person who shall knowingly keep or harbor in any house of prostitution any alien woman within three years after she shall have entered the United States shall file with the Commissioner-General of Immigration a statement concerning such woman, and if such keeper shall fail to file such statement within thirty days then he shall be guilty of a misdemeanor and subject to $2,000 fine and two years' imprisonment. If the keeper furnishes the statement, the woman under the immigration law will be deported in accordance with existing law. If the keeper fails to furnish the statement, the keeper will be punished.

AS TO THE VALIDITY OF THE PROPOSED ACT.

A careful examination of the Constitution, the authorities, and the decided cases seem to show that the provisions of the bill, dependent upon the commerce clause of the Constitution, come within the power of Congress and are constitutional.

It is no longer open to question that the transit of individuals from State to State is interstate commerce. The statement in Mayor *v.* Miln (11 Pet., 102) that persons are not the subject of commerce was overruled in the Passenger Cases (7 How., 429, 432, 436) in the opinion of Justice Wayne, holding that the statement to that effect in the Miln case was dictum and was not adopted by the majority of the court. (See further, Mobile County *v.* Kimball, 102 U. S., 692; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196; Pickard *v.* Pullman Southern Car Co., 117 U. S., 34; Covington & C. Bridge Co. *v* Kentucky, 154 U. S., 204.) Indeed the mere transit of persons arriving at our ports of entry is without reference to traffic the subject of congressional regulation, because it is commerce. (Head Money Cases, 112 U. S., 580; Nishimura Ekiu *v.* U. S., 142 U. S., 651.) The same must be true of the transit of persons from State to State, assuming that foreign commerce is the same as interstate commerce, with the exception of the locus in quo.

Congress, therefore, having the power to regulate the transportation of persons in interstate commerce, it remains to be considered whether or not the proposed regulation is concerning a matter directly connected with interstate commerce or only remotely connected with it.

In determining this the same tests are applicable as those which are pertinent in considering the transportation of property in interstate commerce. As stated in The Lottery cases, 188 U. S., 321, 357:

> As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It is said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, can not be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. What was said by this court upon a former occasion may well be here repeated: "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge." (*In re Rahrer*, 140 U. S., 545, 562.) If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the nation. It is a kind of traffic which no one can be entitled to pursue as of right.

Certainly in the case of lotteries there is nothing harmful in the mere transportation of the pieces of paper. The injury resulted from the connection which existed between those tickets and the entire scheme of the lottery. It was the purpose for which the tickets were used which made them an instrument of injury to the public.

The sections above proposed have been so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution. The use of interstate commerce in sending prostitutes from one State to another in connection with this traffic in women would seem to be as directly connected with interstate commerce as the sending of tickets from one State to another in furtherance of the operation of a lottery. It is true the act of prostitution is not committed in connection with the interstate transportation nor was the drawing in connection with the lottery a part of interstate commerce.

The sections proposed do not amount to an interference with the police power of the State. The simple test, as pointed out in the Rahrer case and in the Lottery cases, is whether or not the State, in the exercise of its police power, could have prohibited the things at which the act is aimed. Manifestly a State could not enact that a person who induced a woman to go from one State to another for purposes of prostitution should not aid or assist in her transportation from one State to another, or that the common carrier should not transport the prostitute. To do so would be a plain attempt to regulate interstate commerce. (Leisy *v.* Hardin, 135 U. S., 100.) Where the subject upon which Congress can act in the exercise of the power to regulate commerce is local in its nature or sphere of

operation, such as harbor pilotage, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, which properly can be regulated only by special provision adapted to their localities, the State can act until Congress interferes and supersedes its authority. Where, however, the subject is national in its character, and demands and requires uniform regulation, and affects all the States, such as transportation between the States, including the importation from one State to another, Congress alone can act on it and provide the needed regulation. (Bowman *v.* Chicago & N. W. R. Co., 125 U. S., 465, 507.)

The rule just stated with reference to the transportation of property of course applies to the transportation of persons. The subject-matter of the legislation being, therefore, one over which the States have no control, it must be, as pointed out above, within the domain of proper federal legislation.

HISTORY OF THE DEVELOPMENT OF THE LAW.

The history of the development of the law forbidding the importation of alien women for purposes of prostitution is as follows:

The first provision relating to this subject was contained in the act of March 3, 1875 (18 Stat. L., 477; also 1 U. S. Comp. Stat., pp. 1286–1287), as follows:

> SEC. 3. That the importation into the United States of women for the purposes of prostitution is hereby forbidden; and all contracts and agreements in relation thereto, made in advance or in pursuance of such illegal importation and purposes, are hereby declared void; and whoever shall knowingly and willfully import, or cause any importation of, women into the United States for the purposes of prostitution, or shall knowingly or willfully hold, or attempt to hold, any woman to such purposes, in pursuance of such illegal importation and contract or agreement, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not exceeding five years and pay a fine not exceeding five thousand dollars.

Section 5 of the same act also contained the following:

> That it shall be unlawful for aliens of the following classes to immigrate into the United States, namely, * * * women "imported for the purposes of prostitution."

The foregoing provision was superseded by section 3 of the act of March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States" (32 Stat. L., 1213; also 1905 Suppl. to U. S. Comp. Stat., p. 276), which provides as follows:

> That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold, any woman or girl for such purposes in pursuance of such illegal importation shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years and pay a fine not exceeding five thousand dollars.

It is to be observed that the provision in question underwent several important changes in the reenactment, as follows:

First. The old act covered the importation only of "any woman." The new act was extended to cover "any woman or girl."

Second. The clause in the old act declaring void contracts or agreements in relation to importing women for the purposes of prostitution was omitted in the new act.

Third. The old act used the language "knowingly and willfully" import and "knowingly and willfully" hold, or attempt to hold, any

person, in pursuance of such illegal importation, etc. The new act eliminated the "knowingly and willfully" and made it an offense to import or to hold or attempt to hold any person in pursuance of such illegal importation.

Fourth. The penalty in each act was the same.

Both of the foregoing provisions were superseded by the act of February 20, 1907, entitled "An act to regulate the immigration of aliens into the United States" (34 Stat. L., 898; 1907 Suppl. U. S. Comp. Stat., 392), as follows:

SEC. 3. That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this act.

The changes introduced into the new provision, worthy of note, are as follows:

First. The new law forbade the importation of any alien woman or girl for the purpose of prostitution, and added the clause "or for any other immoral purpose."

Second. The new law added the words "directly or indirectly" in the clause "and whoever shall, directly or indirectly, import, or attempt to import," etc.

Third. The new law added the following important and also absolutely new provision: "Or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States."

Fourth. The new law added to the section express authorization for the deportation of any alien woman or girl, in the following language:

Any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this act.

SUPREME COURT DECISION CONSTRUING SECTION 3 OF THE ACT OF FEBRUARY 20, 1907.

Section 3 of the act of February 20, 1907, has received the consideration of the Supreme Court in two cases.

In the first case, that of the United States *v.* John Bitty (208 U. S., 393), the Supreme Court held that a foreign woman being brought to the United States as the personal, private mistress of a man living here was being imported "for other immoral purposes," and that, therefore, the importer was subject to the penalty of the statute and the woman to deportation.

This decision is not pertinent to the phase of the subject under discussion, and is mentioned only in passing.

The second case was that of Joseph Keller *v.* United States (213 U. S., 138). In the Keller case the Supreme Court was called to pass squarely upon the constitutionality of that portion of the provision in question which made it an offense to harbor or maintain for the purposes of prostitution any alien woman or girl within three years of her entry into the United States. The exact language of the provision in question is as follows:

> Or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, etc.

The opinion of the court (attached hereto as Appendix C) was delivered by Mr. Justice Brewer. Mr. Justice Holmes delivered a dissenting opinion (attached hereto as Appendix D), which was concurred in by Justices Harlan and Moody.

The case was a typical case of "harboring" exclusively. The uncontradicted testimony was to the effect that the woman, Irene Bodi, came to this country in November, 1905; that she remained in New York until October, 1907; then came to Chicago and went into a house of prostitution at South Chicago, which the defendants purchased in November, 1907, finding the woman then in the house; that she had been in the business of a prostitute for only a few months prior to the trial of the case, in October, 1908, and that the defendants did not know her until November, 1907.

The question of the power of Congress to enact a law for the punishment of anyone "harboring" an alien woman within three years of her arrival, regardless of whether or not she was a prostitute voluntarily or had entered that state against her will, was squarely presented by the facts in the case. The court held that Congress was without power to pass such a law, its position appearing from the statement contained in the following paragraph from the opinion of the court:

> While the keeping of a house of ill fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress.

Bearing in mind the facts in this case—namely, that so far as appeared in the case presented, the defendants had nothing whatever to do with the importation of the woman in question; that so far as they were concerned she was not in a house of ill fame against her will; and that she was an inmate of the house when the establishment was purchased as a going concern—the following suggestions of the court contained in the opinion with reference to the conclusion the court might have reached had the facts been different, are important: For instance, the court says, page 144:

> It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life.

See also on page 147, the court says:

The question is, therefore, whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained. By section 2 of article 2 of the Constitution power is given to the President, by and with the advice and consent of the Senate, to make treaties, but there is no suggestion in the record or in the briefs of a treaty with the King of Hungary under which this legislation can be supported.

The Government stated in its brief these two propositions:

The clause in question should be held valid because it relates to and materially affects the conditions upon which an alien female may be permitted to remain in this country, and the grounds which warrant her exclusion. * * *

The validity of the provision in question should be determined from its general effect upon the importation and exclusion of aliens.

The court then, without stating whether or not either of these propositions was well taken, dismissed them with the statement that "the act charged has no significance in either direction."

In considering the decision of the Supreme Court in the Keller case attention is especially called to the fact that in the opinion the court made the following suggestions:

By section 2 of article 2, of the Constitution, power is given to the President, by and with the advice and consent of the Senate, to make treaties, but there is no suggestion in the record or in the briefs of a treaty with the King of Hungary under which this legislation can be supported.

It is manifest that this is a most pregnant suggestion. A showing that the legislation in question was supported by a treaty could not be made at that time, however, for the reason that at the time of the enactment of the legislation the United States was not a party to the international agreement covering the subject. In fact, this Government did not adhere to the international agreement until a date subsequent to the commission of the offense charged against Keller.

In this connection the chronology of events is important. The existing statute on the subject of the importation of alien women for immoral purposes is contained in section 3 of the act approved February 20, 1907. The alleged illegal act of which the defendant stood convicted was the harboring of an alien woman on June 1, 1908. The United States did not become a party to the international agreement for the repression of the trade in white women until June 15, 1908, at which time this Government adhered to the agreement by virtue of a proclamation issued by President Roosevelt. It appears, therefore, that the statute in question became a law, and the offense involved was committed, previous to the date on which this Government became a party to the international agreement.

So far Congress has not enacted legislation to insure the carrying out of the provisions of the treaty in question.

The following clearly appears from an analysis of the Supreme Court decision above mentioned:

First. That Congress may properly enact legislation affecting the conduct of an alien while residing here for a period of at least two or three years after the alien's arrival.

Second. That Congress may provide for the punishment of wrongs done to an alien during the probationary period—that is to say, the Supreme Court intimates very broadly that Congress has the power to enact a law making it an offense to "harbor" for immoral purposes, by force or against her will, an alien woman or girl within the limited period referred to.

Third. That in the carrying out of a treaty obligation Congress has the authority to pass an act making it an offense to harbor an alien woman or girl for immoral purposes, even in the absence of a showing that force or restraint is used—that is to say, in the decision above referred to the Supreme Court suggests that a different conclusion might have been reached under the very clause then under consideration had it appeared that the provision in question was the carrying out of a treaty agreement.

EXISTING LAWS.

Section 3 of the act of February 20, 1907 (34 Stat., 899; also 1907 Suppl. U. S. Comp. Stat., p. 392), is as follows:

NOTE.—The italic portion of the following section is the portion which was held unconstitutional by the Supreme Court in the Keller case:

That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, *or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose any alien woman or girl, within three years after she shall have entered the United States*, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this act.

Section 2 of the same act provides as follows:

That the following classes of aliens shall be excluded from admission into the United States; * * * prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose; * * *.

"THE WHITE SLAVE TRADE."

A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.

The evil, as a present day existing evil of widespread dimensions which has arisen, has been given careful attention by the representatives of most of the civilized nations of the world, and has been made the subject of an international agreement. Thousands of public-spirited citizens have combined in various national and State organizations for the purpose of lending their aid in its suppression. The white-slave trade has been so prevalent that prosecuting officers,

both state and federal, even under inadequate and insufficient laws, have been able to secure many notable convictions. It is an evil which many state legislatures have attempted to regulate within the past two or three years by means of the enactment of state statutes. Inasmuch, however, as the traffic involves mainly the transportation of women and girls from the country districts to the centers of population and their importation from foreign nations the evil is one which can not be met comprehensively and effectively otherwise than by the enactment of federal laws.

Investigations conducted by government agents disclose the fact that a national and international traffic exists in the buying, selling, and exploitation of women and young girls for immoral purposes. This traffic has come to be known the world over as "the white-slave trade." It is referred to by the Paris conference as "the trade in white women."

There are few who really understand the true significance of the term "white-slave trade." Most of those who have given only a casual thought to the subject have the impression that women who lead immoral lives in public houses are there voluntarily, either because they are attracted by the excitement of such a life or because they have found it an easy way of earning a living. In many cases such is not the fact. The results of careful investigation into this subject disclose the fact that the inmates of many houses of ill fame are made up largely of women and girls whose original entry into a life of immorality was brought about by men who are in the business of procuring women for that purpose—men whose sole means of livelihood is the money received from the sale and exploitation of women who, by means of force and restraint, compel their victims to practice prostitution. These investigations have disclosed the further fact that these women are practically slaves in the true sense of the word; that many of them are kept in houses of ill fame against their will; and that force, if necessary, is used to deprive them of their liberty.

The characteristic which distinguishes "the white-slave trade" from immorality in general is that the women who are the victims of the traffic are unwillingly forced to practice prostitution. The term "white slave" includes only those women and girls who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude; those who practice prostitution as a result of the activities of the procurer, and who, for a considerable period at least, continue to lead their degraded lives because of the power exercised over them by their owners. In short, the white-slave trade may be said to be the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes. Its victims are those women and girls who, if given a fair chance, would, in all human probablility, have been good wives and mothers and useful citizens.

The preamble of an existing international agreement on this subject states that the several governments

being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as minor women and girls, and efficacious protection against the criminal traffic known under the name of trade in white women ("traite des blanches"), have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose.

It is the purpose of the proposed laws, in so far as it may be possible for Congress to do so, to protect women and girls against this criminal traffic by providing for the punishment of those engaged in that traffic and by regulations established by the act.

Extensive investigation by government commissions and prosecuting officers in various parts of the country disclose the fact that in many cases involving women and girls imported into this country, and those transported from one State to another, the procurers resort to all of the means and devices known to the criminal classes to accomplish their purposes. Liquor, trickery, deceit, fraud, and the use of force are resorted to by the procurer to place the girl under his power. In some cases, those who have been induced to come to the large cities are first introduced to the house of prostitution under the influence of liquor; in others, the procurer enters into a pretended marriage with his victim; in many cases involving the importation of women and girls from abroad and their transportation from one State to another the inducement is the promise of legitimate employment with handsome compensation. Hundreds of men in large cities live from the earnings of the victims of the white-slave trade, and in many instances the more extensive of international procurers live in affluence. The books kept by a notorious importer of French girls, who was arrested in Chicago a few months ago, disclosed his earnings for the year previous to his arrest, largely from his importation and wholly from his exploitation of girls, to have been more than $102,000.

The investigations into this subject conclusively show the fact that for some time after they are first unwillingly forced to take up a life of prostitution many of the victims would at once abandon it were it possible for them to do so. The facts are that in order to insure her continuance in the degraded life, to which she has unwillingly been forced to submit, the procurer has resort to physical violence and the maintenance of a system of surveillance which makes her, to all intents and purposes, a prisoner. Obviously the portions of the act which require the proprietor of a house of ill fame to report to the federal authorities concerning the arrival in the establishment of an alien woman or girl would, at least so far as concerns aliens, make unlawful detention practically impossible.

The national and international importance of suppressing this criminal traffic is clearly shown by reference to the treaty, the preamble of which is given above, and reports of governmental officers and others on the subject.

The Secretary of Commerce and Labor, in his annual report for 1908, page 18, refers to the matter in the following terms:

> It is highly necessary that this diabolical traffic, which has attained international proportions, should be dealt with in a manner adequate to compass its suppression. No punishment is too severe to inflict upon the procurers in this vile traffic.

The act of February 20, 1907 (sec. 29), created an immigration commission, the membership of which was to consist of three Senators, three Members of the House of Representatives, and three persons to be appointed by the President of the United States. In a preliminary report submitted February 27, 1909 (Doc. 1489), the commission says:

> The commission has made an extensive investigation into the question of the importation and harboring of women for immoral purposes. The results show that

many women are being regularly imported under conditions which often amount to absolute slavery.

* * * * * * *

It is believed that as a result of this investigation the commission will be able to make recommendations which will put a very decided check upon this horrible traffic, if, indeed, it will not practically break it up entirely.

THE TRAFFIC IS SYSTEMATIC AND EXTENSIVE.

Governmental investigations which have been conducted disclose the fact that the importation of women and girls from foreign countries has been systematic and continuous, and has not been limited to isolated and accidental cases. The facts in connection with investigations conducted by the district attorney at Chicago may be taken as typical of the situation in many other cities.

At the time of the arrest of several notorious French importers in Chicago, a large amount of correspondence and other documentary evidence fell into the hands of the authorities. This evidence showed beyond a reasonable doubt that there was in existence an organized system, or syndicate, having for its purpose the importation of women from foreign countries to Chicago and other cities in the United States for immoral purposes. This syndicate had headquarters and distributing centers in New York, Chicago, Omaha, Denver, San Francisco, Los Angeles, Seattle, and Nome, Alaska.

It is conservatively estimated, from an examination of the data and information at hand, that the syndicate has imported annually during the preceding eight or ten years on an average of about 2,000 women—largely French. It also appears that the syndicate regularly sent agents to Europe to procure girls, at stated prices, to be brought to the United States, where they were placed at the disposal of the keepers of houses of prostitution. The usual method employed in evading the immigration officers at the ports of entry was to pass the women as the wives or sisters of the procurers with whom they arrived.

One of the chief members of this syndicate was the Frenchman Alphonse Dufaur, who was the defendant in six indictments, in the Chicago district, charging him with harboring alien women in violation of the existing law. Dufaur and his wife subsequently forfeited bonds in the sum of $25,000 and became fugitives from justice.

Another active importer and procurer were Henry Lair, who operated establishments in Chicago and San Francisco. One of Lair's agents was a man named Louis Paint, who, some time ago, was convicted of importing in New York, and who is now serving a sentence of four years in the penitentiary at Atlanta, Ga., for importing women for Lair. On the recent trial of Lair, in Chicago, Paint testified that he had been given $800 by Lair and told to go to Paris for the purpose of procuring two girls for Lair's establishment in Chicago. Lair was convicted and sentenced by Judge Landis to serve two years at hard labor in the penitentiary at Fort Leavenworth and to pay a fine of $2,500.

Various arrests have been made in the Chicago district which disclose the existence of a traffic in girls from Hungary, Sweden, Norway, Denmark, Great Britain, and other countries.

In this connection it is of interest to note the profits realized by those engaged in the importation of alien women for the purpose

of prostitution. For this purpose the information in the possession of the Government, as the result of prosecution against the French procurer Dufaur, which is definite and accurate, may be taken as typical of the remunerative character of the traffic. The books of account kept by Dufaur show that his income, from his establishment in Chicago, realized largely as a result of his success as an importer, was, for the twelve months immediately preceding his arrest, upwards of $102,000. These books also show that during the month of May, previous to his arrest, the earnings of one girl, a recent importation, were $723. In almost every instance which has come to the attention of the authorities the girls who were imported from France by the French syndicate were compelled to turn over every day to the proprietor of the establishment in which they were detained all their earnings. They were usually allowed only enough to purchase the clothing necessary to make them attractive to frequenters of the place.

INTERNATIONAL AGREEMENT FOR THE REPRESSION OF THE TRADE IN WHITE WOMEN.

A project of arrangement for the suppression of the white slave traffic was, on July 25, 1902, adopted for submission to their respective governments by the delegates of various powers represented at the Paris conference for the repression of the trade in white women.

The stipulations of this project of arrangements were confirmed by preliminary agreement signed at Paris, May 18, 1904, by the Governments of Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden, Norway, and the Swiss Federal Council.

By its resolution of March 1, 1905, the Senate of the United States advised and consented to the adhesion by the United States to the said project of arrangement, and therefore, on June 6, 1908, the President announced the adherence on the part of this Government to the project, and this adherence was on June 15, 1908, covered by the proclamation of the President. This treaty was published in pamphlet form by the State Department as Treaty Series, No. 496, and a complete copy is attached hereto as Appendix B. The preamble of this agreement recites that the various governments, being desirous to assure to women who have attained their majority, and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the criminal traffic known under the name of trade in white women ("traite des blanches"), have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose.

The terms of the agreement as set forth in the various articles are as follows:

ARTICLE 1. Each of the Contracting Governments agrees to establish or designate an authority who will be directed to centralize all information concerning the procuration of women or girls both in a view to their debauchery in a foreign country; that authority shall have the right to correspond directly with the similar service established in each of the other Contracting States.

ART. 2. Each of the Governments agrees to exercise a supervision for the purpose to find out, particularly in the stations, harbours of embarkation, and on the journey, the conductors of women or girls intended for debauchery. Instructions shall be sent for that purpose to the officials or to any other qualified persons, in order to procure, within the limits of the laws, all information of a nature to discover a criminal traffic.

The arrival of persons appearing evidently to be the authors, the accomplices or the victims of such a traffic will be notified, in each case, either to the authorities of the place of destination or to the interested diplomatic or consular agents, or to any other competent authorities.

ART. 3. The Governments agree to receive, in each case within the limits of the laws, the declarations of women and girls of foreign nationality who surrender themselves to prostitution, with a view to establish their identity and their civil status and to ascertain who has induced them to leave their country. The information received will be communicated to the authorities of the country of origin of the said women or girls, with a view to their eventual return.

The Governments agree, within the limits of the laws and as far as possible, to confide temporarily and with a view to their eventual return, the victims of criminal traffic, when they are without any resources, to some institutions of public or private charity or to private individuals furnishing the necessary guaranties.

The Governments agree also, within the limits of the laws, to return to their country of origin, those women or girls who ask their return or who may be claimed by persons having authority over them. Return will be made only after reaching an understanding as to their identity and nationality, as well as to the place and date of their arrival at the frontiers. Each of the contracting parties will facilitate the transit on his territory.

The correspondence relative to the return will be made, as far as possible, through the direct channel.

ART. 4. In case the woman or girl to be sent back can not pay herself the expenses of her transportation and she has neither husband nor relations nor guardian to pay for her the expenses occasioned by her return, they shall be borne by the country or the territory of which she resides as far as the nearest frontier or port of embarkation in the direction of the country of origin, and by the country of origin for the remainder.

ART. 5. The provisions of the above articles 3 and 4 shall not infringe upon the provisions of special conventions which may exist between the contracting Governments.

ART. 6. The contracting Governments agree, within the limits of the laws, to exercise, as far as possible, a supervision over the bureaus or agencies which occupy themselves with finding places for women or girls in foreign countries.

Articles 7, 8, and 9 provide for the adhesion of the nonsignatory States, that the present arrangement shall take effect six months after the date of the exchange of the ratifications, and for the formalities attending the ratification and exchange of the agreement, respectively.

DOCUMENTS SUBMITTED HEREWITH.

For convenience of reference the following documents are made a part of this report:

Appendix A.—Copy of agreement between the United States and other powers for the repression of the trade in white women.

Appendix B.—Copy of the opinion of the Supreme Court of the United States in the Keller case.

Appendix C.—Copy of dissenting opinion of the Supreme Court of the United States in the Keller case.

Appendix D.—Extract from statement of the Immigration Commission, issued February 27, 1909.

Appendix E.—Extract from annual report of the Secretary of Commerce and Labor, 1908.

Appendix F.—Extract from annual report of the Commissioner-General of Immigration for year ended June 30, 1907.

Appendix G.—Extract from annual report of the Commissioner-General of Immigration for year ended June 30, 1908.

Appendix H.—Letter from United States District Attorney Edwin W. Sims to the Immigration Commission.

Appendix I.—Recommendations of the Immigration Commission in Report of December 10, 1909. (See Senate Document 196, Second session, Sixty-first Congress.)

APPENDIX A.—*Agreement between the United States and other powers for the repression of the trade in white women.*

[Signed at Paris, May 18, 1904. Ratification advised by the Senate March 1, 1905. Adhered to by the President, June 6, 1908. Proclaimed, June 15, 1908.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a project of arrangement for the suppression of the white slave traffic was, on July 25, 1902, adopted for submission to their respective Governments by the delegates of various Powers represented at the Paris Conference for the repression of the trade in white women;

And whereas, in pursuance of Article VII of the said project of arrangement, the Government of the United States was, on August 18, 1902, invited by the Government of the French Republic to adhere thereto;

And whereas the Senate of the United States, by its Resolution of March 1, 1905 (two-thirds of the Senators present concurring therein), did advise and consent to the adhesion by the United States to the said project of arrangement;

And whereas the stipulations of the said project of arrangement were, word for word, and without change, confirmed by a formal agreement, signed at Paris on May 18, 1904, by the Governments of Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden, Norway, and the Swiss

Federal Council, a true copy of which agreement, in the French language, at hereto attached;

And whereas the ratifications by the said Governments of the said agreement have been duly deposited with the Government of the French Republic; and the said agreement has been adhered to by the Governments of Austria-Hungary and Brazil;

And whereas the President of the United States of America, in pursuance of the aforesaid advice and consent of the Senate, did, on the 6th day of June, 1908, declare that the United States adheres to the said agreement in confirmation of the said project of arrangement:

Now, therefore, be it known that I, Theodore Roosevelt, President of the United States of America, have caused the said agreement to be made public, to the end that the same, and every article and clause thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 15th day of June, in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States of America the one hundred and thirty-second.

[SEAL.] THEODORE ROOSEVELT.

By the President:
ROBERT BACON,
Acting Secretary of State.

THE AGREEMENT.

His Majesty the German Emperor, King of Prussia, in the name of the German Empire; His Majesty the King of the Belgians; His Majesty the King of Denmark; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of Italy; Her Majesty the Queen of the Netherlands; His Majesty the King of Portugal and of the Algarves; His Majesty the Emperor of All the Russias; His Majesty the King of Sweden and Norway, and the Swiss Federal Council, being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the criminal traffic known under the name of trade in white women ("*Traite des Blanches*"), have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose and have appointed as their plenipotentiaries, that is to say:

The President of the French Republic, His Excellency M. th. Delcasse, deputy, minister for foreign affairs of the French Republic;

His Majesty the German Emperor, King of Prussia, His Serene Highness Prince Radolin, his ambassador extraordinary.

His Majesty the King of the Belgians, M. A. Leghait, his envoy extraordinary and minister plenipotentiary to the President of the French Republic;

His Majesty the King of Denmark, Count F. Reventlow, his envoy extraordinary and minister plenipotentiary to the President of the French Republic;

His Majesty the King of Spain, His Excellency M. F. de Leon y Castillo, Marquis del Muni, his ambassador extraordinary and plenipotentiary to the President of the French Republic;

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas, Emperor of India, His Excellency Sir E. Monson, his ambassador extraordinary and plenipotentiary to the President of the French Republic;

His Majesty the King of Italy, His Excellency Count Tornielli Brusati di Vergano, his ambassador extraordinary and plenipotentiary to the President of the French Republic;

Her Majesty the Queen of the Netherlands, M. le Chevalier de Stuers, her envoy extraordinary and minister plenipotentiary to the President of the French Republic;

His Majesty the King of Portugal and of the Algarves, M. T. de Souza-Roza, his envoy extraordinary and minister plenipotentiary to the President of the French Republic;

His Majesty the Emperor of all the Russias, his excellency M. de Nelidow, his ambassador extraordinary and plenipotentiary to the President of the French Republic;

His Majesty the King of Sweden and Norway: for Sweden and for Norway, M. Akerman, his envoy extraordinary and minister plenipotentiary to the President of the French Republic;

And the Swiss Federal Council, M. Charles Edouard Lardy, envoy extraordinary and minister plenipotentiary of the Swiss Confederation to the President of the French Republic;

Who, having exchanged their full powers, found in good and due form, have agreed upon the following provisions:

ARTICLE 1. Each of the contracting Governments agrees to establish or designate an authority who will be directed to centralize all information concerning the procuration of women or girls both in a view to their debauchery in a foreign country; that authority shall have the right to correspond directly with the similar service established in each of the other contracting States.

ART. 2. Each of the Governments agrees to exercise a supervision for the purpose to find out, particularly in the stations, harbours of embarkation, and on the journey, the conductors of women or girls intended for debauchery. Instructions shall be sent for that purpose to the officials or to any other qualified persons, in order to procure, within the limits of the laws, all information of a nature to discover a criminal traffic.

The arrival of persons appearing evidently to be the authors, the accomplices, or the victims of such a traffic will be notified, in each case, either to the authorities of the place of destination or to the interested diplomatic or consular agents, or to any other competent authorities.

ART. 3. The governments agree to receive, in each case, within the limits of the laws, the declarations of women and girls of foreign nationality who surrender themselves to prostitution, with a view to establish their identity and their civil status and to ascertain who has induced them to leave their country. The information received will be communicated to the authorities of the country of origin of the said women or girls, with a view to their eventual return.

The Governments agree, within the limits of the laws and as far as possible, to confide temporarily and with a view to their eventual

return, the victims of criminal traffic, when they are without any resources, to some institutions of public or private charity or to private individuals furnishing the necessary guaranties.

The Governments agree also, within the limits of the laws, to return to their country of origin those of those women or girls who ask their return or who may be claimed by persons having authority over them. Return will be made only after reaching an understanding as to their identity and nationality, as well as to the place and date of their arrival at the frontiers. Each of the Contracting Parties will facilitate the transit on his territory.

The correspondence relative to the return will be made, as far as possible, through the direct channel.

ART. 4. In case the woman or girl to be sent back can not pay herself the expenses of her transportation, and she has neither husband nor relations nor guardian to pay for her the expenses occasioned by her return, they shall be borne by the country on the territory of which she resides as far as the nearest frontier or port of embarkation in the direction of the country of origin, and by the country of origin for the remainder.

ART. 5. The provisions of the above articles 3 and 4 shall not infringe upon the provisions of special conventions which may exist between the contracting governments.

ART. 6. The contracting Governments agree, within the limits of the laws, to exercise, as far as possible, a supervision over the bureaux or agencies which occupy themselves with finding places for women or girls in foreign countries.

ART. 7. The non-signatory States are admitted to adhere to the present arrangement. For this purpose they shall notify their intention, through the diplomatic channel, to the French Government, which shall inform all the contracting States.

ART. 8. The present arrangement shall take effect six months after the date of the exchange of ratifications. In case one of the contracting parties shall denounce it, that denunciation shall take effect only as regards that party and then twelve months only from the date of the day of the said denunciation.

ART. 9. The present arrangement shall be ratified and the ratifications shall be exchanged at Paris as soon as possible.

In faith whereof the respective plenipotentiaries have signed the present agreement and thereunto affixed their seals.

Done at Paris, the 18th May, 1904, in single copy, which shall be deposited in the archives of the Ministry of Foreign Affairs of the French Republic, and of which one copy, certified correct, shall be sent to each contracting party.

APPENDIX B.

IN THE SUPREME COURT OF THE UNITED STATES.

Keller *v.* The United States. (213 U. S. Reports, 138.)

(Decided April 5, 1909.)

Section 3 of the act of Congress of February 20, 1907 (34 Stat. 898, 899), entitled "An act to regulate the immigration of aliens into the United States," reads as follows:

SEC. 3. That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or *whoever shall keep, maintain, control, support, or harbor, in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars;* and any alien woman or girl who shall be found an inmate of a house of prostitution, or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported as provided by sections twenty and twenty-one of this act.

The plaintiffs in error were indicted for a violation of this section, the charge against them being based upon that portion of the section which is in italics, and in terms that they "willfully and knowingly did keep, maintain, control, support, and harbor in their certain house of prostitution" (describing it) "for the purpose of prostitution a certain alien woman, to wit, Irene Bodi," who was, as they well knew, a subject of the King of Hungary, who had entered the United States within three years. A trial was had upon this indictment; the plaintiffs in error were convicted and sentenced to the penitentiary for eighteen months.

Mr. Justice Brewer delivered the opinion of the court.

The single question is one of constitutionality. Has Congress power to punish the offense charged, or is jurisidiction thereover solely with the State? Undoubtedly, as held, "Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers." (Turner *v.* Williams, 194 U. S., 279, 289. See also Fong Yue Ting *v.* United States, 149 U. S., 698, 708; Head Money Cases, 112 U. S., 580, 591; Lees *v.* United States, 150 U. S., 476, 480; United States *v.* Bitty, 208 U. S., 393.)

It is unnecessary to determine how far Congress may go in legislating with the respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires or the testimony shows she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress.

In Patterson *v.* Kentucky (97 U. S., 501, 503) is this declaration:

"In the American constitutional system," says Mr. Cooley, "the power to establish the ordinary regulations of police has been left with the individual States, and can not be assumed by the National Government." (Cooley Const. Lim., 574.) While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the States must observe in its exer-

cise, the existence of such a power in the States has been uniformly recognized in this court. (Gibbons *v.* Ogden, 9 Wheat., 1; License cases, 5 How., 504; Gilman *v.* Philadelphia, 3 Wall., 713; Henderson et al. *v.* Mayor of the City of New York et al., 92 U. S., 259; Railroad Company *v.* Husen, 95 Id., 465; Beer Company *v.* Massachusetts, supra, p. 25.) It is embraced in what Mr. Chief Justice Marshall in Gibbons *v.* Ogden calls that "immense mass of legislation," which can be most advantageously exercised by the States, and over which the national authorities can not assume supervision or control.

And in Barbier *v.* Connolly (113 U. S., 27, 31) it is said:

But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.

Further, as the rule of construction, Chief Justice Marshall, speaking for the court in the great case of McCollough *v.* State of Maryland (4 Wheat., 316, 405), declares:

This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In Houston *v.* Moore (5 Wheat., 1, 48) Mr. Justice Story says:

Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution.

(Article 10 of Amendments; City of New York *v.* Miln, 11 Pet., 102, 133; License Cases, 5 How., 504, 608, 630; United States *v.* Dewitt, 9 Wall., 41, 44; Patterson *v.* Kentucky, 97 U. S., 501, 503; Barbier *v.* Connolly, 113 U. S., 27, 31; in re Rahrer, 140 U. S., 545, 555; United States *v.* Knight, 156 U. S., 1, 11; Cooley's Constitutional Limitations, 574.)

Doubtless it not infrequently happens that the same act may be referable to the power of the State as well as to that of Congress. If there be collision in such a case, the superior authority of Congress prevails. As said in City of New York *v.* Miln (11 Pet., 102, 137):

From this it appears that whilst a State is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress acting under a different power, subject only, say the court, to this limitation, that in the event of collision the law of the State must yield to the law of Congress. The court must be understood, of course, as meaning that the law of Congress is passed upon a subject within the sphere of its power.

In Gulf, Colorado & Santa Fe Railway *v.* Hafley (158 U. S., 98, 104) the rule is stated in these words:

Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation. "No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution." (Henderson *v.* New York, 92 U. S., 259,

271.) "Definitions of the police power must, however, be taken subject to the condition that the State can not, in its exercise, for any purpose whatever, encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land." (New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S., 650, 661.) "While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of federal authority as defined by the Constitution, the latter must prevail." (Morgan *v.* Louisiana, 118 U. S., 455, 468.)

See also Lottery case (188 U. S., 321).

The question is therefore whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained. By section 2 of Article II of the Constitution, power is given to the President, by and with the advice and consent of the Senate, to make treaties; but there is no suggestion in the record or in the briefs of a treaty with the King of Hungary under which this legislation can be supported.

The general power which exists in the nation to control the coming in or removal of aliens is relied upon, the Government stating in its brief these two propositions:

> The clause in question should be held valid because it relates to and materially affects the conditions upon which an alien female may be permitted to remain in this country, and the grounds which warrant her exclusion.
>
> * * * * * * *
>
> The validity of the provision in question should be determined from its general effect upon the importation and exclusion of aliens.

But it is sufficient to say that the act charged has no significance in either direction.

As to the suggestion that Congress has power to punish one assisting in the importation of a prostitute, it is enough to say that the statute does not include such a charge; the indictment does not make it, and the testimony shows, without any contradiction, that the woman, Irene Bodi, came to this country in November, 1905; that she remained in New York until October, 1907; then came to Chicago and went into the house of prostitution which the defendants purchased in November, 1907, finding the woman then in the house; that she had been in the business of a prostitute only about ten or eleven months prior to the trial of the case in October, 1908, and that the defendants did not know her until November, 1907. In view of these facts the question of the power of Congress to punish those who assist in the importation of a prostitute is entirely immaterial.

The act charged is only one included in the great mass of personal dealings with aliens. It is her own character and conduct which determines the question of exclusion or removal. The acts of others may be evidence of her business and character. But it does not follow that Congress has the power to punish those whose acts furnish evidence from which the Government may determine the question of her expulsion. Every possible dealing of any citizen with the alien may have more or less induced her coming. But can it be within the power of Congress to control all the dealings of our citizens with resident aliens? If that be possible, the door is open to the assumption by the National Government of an almost unlimited body of legislation. By the census of 1900 the population of the United States between the oceans was, in round numbers, 76,000,000. Of these

10,000,000 were of foreign birth, and 16,000,000 more were of foreign parentage. Doubtless some have become citizens by naturalization, but certainly scattered through the country there are millions of aliens. If the contention of the Government be sound, whatever may have been done in the past, however little this field of legislation may have been entered upon, the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens. That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens.

In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. Fairbank *v.* United States (181 U. S., 283). To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in Texas *v.* White (7 Wall., 700,725), that "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

The judgments are reversed, and the cases remanded to the district court of the United States for the northern district of Illinois with instructions to quash the indictment.

Appendix C.

DISSENTING OPINION IN KELLER CASE.

Mr. Justice Holmes, dissenting.

For the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts. (Yamataya *v.* Fisher (*Japanese Immigrant Case*), 189 U. S., 86.) To this end it may make their admission conditional for three years. (Pearson *v.* Williams, 202 U. S., 281.) If the ground of exclusion is their calling, practice of it within a short time after arrival is or may be made evidence of what it was when they came in. Such retrospective presumptions are not always contrary to experience or unknown to the law. (Bailey *v.* Alabama, 211 U. S., 452, 454.) If a woman were found living in a house of prostitution within a week of her arrival, no one, I suppose, would doubt that it tended to show that she was in the business when she arrived. But how far back such an inference shall reach is a question of degree like most of the questions of life. And

while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, that it is too long.

The statute does not state the legal theory upon which it was enacted. If the ground is that which I have suggested, it is fair to observe that the presumption that it creates is not open to rebuttal. I should be prepared to accept even that, however, in view of the difficulty of proof in such cases. Statutes of which the justification must be the same are familiar in the States. For instance, one creating the offense of being present when gaming implements are found (Commonwealth *v.* Smith, 166 Mass., 370, 375, 376), or punishing the sale of intoxicating liquors without regard to knowledge of their intoxicating quality (Commonwealth *v.* Hallett, 103 Mass., 452), or throwing upon a seducer the risk of the woman turning out to be married or under a certain age. (Commonwealth *v.* Elwell, 2 Met., 190. Reg. *v.* Prince, L. R. 2 C. C., 154.)

It is true that in such instances the legislature has power to change the substantive law of crimes, and it has been thought that when it is said to create a conclusive presumption as to a really disputable fact, the proper mode of stating what it does, at least as a general rule, is to say that it has changed the substantive law. (2 Wigmore, Ev. secs. 1353 et seq.) This may be admitted without denying that considerations of evidence are what lead to the change. And if it should be thought more philosophical to express this law in substantive terms, I think that Congress may require, as a condition of the right to remain, good behavior for a certain time in matters deemed by it important to the public welfare and of a kind that indicates a preexisting habit that would have excluded the party if it had been known. Therefore I am of opinion that it is within the power of Congress to order the deportation of a woman found practicing prostitution within three years.

If Congress can forbid the entry and order the subsequent deportation of professional prostitutes it can punish those who cooperate in their fraudulent entry. "If Congress has power to exclude such laborers * * * it has the power to punish any who assist in their introduction." That was a point decided in Lees *v.* United States (150 U. S., 476, 480). The same power must exist as to cooperation in an equally unlawful stay. The indictment sets forth the facts that constitute such cooperation and need not allege the conclusion of law. On the principle of the cases last cited, in order to make its prohibition effective, the law can throw the burden of finding out the fact and date of a prostitute's arrival from another country upon those who harbor her for a purpose that presumably they know in any event to be contrary to law. Therefore, while I have admitted that the time fixed seems to me to be long, I can see no other constitutional objection to the act, and, as I have said, I think that that one ought not to prevail.

Mr. Justice Harlan and Mr. Justice Moody concur in this dissent.

APPENDIX D.—*Importation for immoral purposes.*

[Extract from statement relative to the work and expenditures of the Immigration Commission, issued February 27, 1909, as Document No. 1489.]

The commission has made an extensive investigation into the question of the importation and harboring of women for immoral purposes. The results show that many women are being regularly

siderable. But the bureau is satisfied, from the experience of its field officers, that much still remains to be done. The number of foreign prostitutes and procurers or importers of prostitutes being detected and deported (see Table III A, p. 12) furnishes incontrovertible evidence on this point. Some especially good work has been done in several of the Western States, notably Montana. In this respect, also, the new immigration act (secs. 2 and 3) is a decided improvement over the old, and places in the hands of the bureau a weapon with which it hopes to make an energetic and effective fight. The bureau believes that this provision for the cure of existing evils should be supplemented by a preventive measure which it here suggests: A number of thoroughly qualified women, equipped with a sufficient knowledge of foreign languages, should be selected and appointed for service on the vessels of several of the larger steamship lines, their duty being to travel from foreign ports on the vessels with the alien women, mixing freely with them, forming their acquaintance, and gathering every available bit of information concerning their antecedents and their purposes and hopes in coming to America. Thus could be gained, it is believed, often accurately and in detail, data which could be placed before boards of special inquiry upon arrival at the United States ports, enabling such boards to pass intelligently upon the admissibility of the alien women.

Of course, the greatest care would have to be exercised in selecting women for positions of such responsibility. Doubtless the steamship lines would consent to such an arrangement, and the cost involved would be inconsiderable as against the importance of the object in view. Little or nothing, comparatively, can be accomplished by an inspection of, and intermixture with, the female steerage passengers after the vessels reach quarantine stations on our coasts—the period from that time till landing is too limited—but under the arrangement suggested the time would be ample for women possessing the requisite qualifications of mind, heart, and temperament to ascertain much of interest regarding the passengers among whom they would mingle.

APPENDIX G.

[Extract from Annual Report of the Commissioner-General of Immigration for the fiscal year ended June 30, 1908.]

Reference to Tables III and IIIA will show that during the past year there has been great activity on the part of the bureau in the suppression of the importation of alien women for purposes of prostitution or "other immoral purposes." The first table shows that of prostitutes and women coming for other immoral purposes 124 have been rejected at the ports, and of procurers of prostitutes 43. Table IIIA shows that 44 alien prostitutes and 2 procurers have been deported from the country, and the bureau's files show that 14 procurers and keepers of houses of ill fame have been convicted and sentenced to terms of imprisonment and fines, the sentence in 4 cases being imprisonment for from one to five years and in the remaining 10 both imprisonment and fine, ranging from six months to eighteen months and from $50 to $1,000. The law now in force is a great improvement over former immigration laws, both in its provisions with respect to the exclusion and expulsion of immoral alien women and in the penalties it attaches to importing or har-

boring alien prostitutes or alien women similarly immoral, or placing in houses of ill fame alien women who have entered this country with the intent to lead lives of virtue. Not only is the law, by the terms in which enacted, made much broader than heretofore, but, fortunately, the first case brought in the courts to test its scope was carried up to the Supreme Court, and a decision sustaining the Government's contention for a construction of the broadest possible kind has been handed down. Reference is had to the case of United States *v.* John Bitty (208 U. S., 393), in which the Supreme Court held that a foreign woman being brought to the United States as the personal, private mistress of a man living here was being imported "for other immoral purposes," and that therefore the importer was subject to the penalty of the statute and the woman to deportation.

Early in the year a circular of special instructions with respect to the arrest and deportation of immoral alien women was issued, and a systematic campaign having that object in view has been inaugurated. Already, as shown by the figures given, good results are being attained, and it is confidently expected that much more will be accomplished hereafter. One of the greatest difficulties encountered is the fact that most women brought into this country as "white slaves" are carefully instructed by their masters to make no damaging admissions with regard to the date of their arrival or the name under which the ocean passage was booked, and to claim always that the date of arrival was more than three years previously, three years being the limit of time fixed in the law within which deportation may be effected. To partly overcome this plan to block ascertainment of the actual date of arrival of such persons and disprove their fictitious claims, the department felt justified in holding that, if an immoral woman refuses to furnish the correct date of arrival and the name under which she traveled, it will be assumed for administrative purposes that she arrived within the three-year period, and unless she disproves such presumption of fact deportation will follow. This is having a good effect. What will do more than anything else to break up the nefarious barter in humanity will be securing, in the large centers particularly, a few such sentences in the cases of the procurers as that given David Rokoff by District Judge Morris, of Baltimore. Rokoff was shown to be an outrageous violator of the law regarding procuring and holding alien women to prostitution, and the judge, promptly upon the return of a verdict of guilty, pronounced a sentence of five years' imprisonment in the penitentiary.

Several of the immigration officials who were detailed abroad during the year reported that the white-slave traffic was flourishing between European and North and South American countries, and that it was a matter of regret that the United States had not yet become a party to the agreement between the leading European countries for cooperation in the breaking up of the traffic. On June 6, 1908, however, the President, on behalf of the United States, proclaimed said agreement, the text of which is as follows, the countries signatory being Great Britain, France, Germany, Belgium, Denmark, Spain, Italy, the Netherlands, Portugal, Russia, Sweden, Norway, and Switzerland.

See also Senate Document 196, second session, Sixty-first Congress, being a report from the Immigration Commission on the importation and harboring of women for immoral purposes, presented December 10, 1909.

APPENDIX H.—*Letter from United States District Attorney Edwin W. Sims to the Immigration Commission.*

DEPARTMENT OF JUSTICE,
OFFICE OF UNITED STATES ATTORNEY,
NORTHERN DISTRICT OF ILLINOIS,
826–833 Federal Building, Chicago, February 3, 1909.

In compliance with the suggestion that I furnish you with a statement of the work done by the United States attorney's office at Chicago in connection with the prosecution of violations of section 3 of the act of July 1, 1907—the so-called "white-slave law"—I have the honor to state:

Reports of numerous violations of this law were first made to this office early in 1908 by slum workers and the members of charitable and humane organizations which labor in the red-light districts. As a result of preliminary investigations which I caused to be made, I reached the conclusion that the law was being violated on an extensive scale. Accordingly, in May, warrants were sworn out for the arrest of eight or ten keepers, charging them with the detention of alien girls. Notwithstanding the fact that this office exercised every precaution to keep the proposed arrests secret, the matter in some way leaked out, and when the deputy United States marshals went to the Twenty-second street district to make the arrests, all of the parties wanted had mysteriously disappeared. After making some ineffectual attempts to locate these parties, I reached the conclusion that without some specially trained force it would be practically impossible, with the regular force of the office, to secure successful results.

It was at this stage of the proceedings that you called at the office and advised me that you were in a position to turn over to me information which had been collected by the agents of the Immigration Commission, and also that the agents of the commission, who were at that time collecting data and information in this district, would turn the same over to us to aid us in the prosecutions. I found that the information which had been collected by the agents of the commission was exactly what we wanted, and acting on it a few days later we made several raids, which resulted in a large number of arrests. Since that time, largely as a result of the information which has been furnished us by the agents of the commission, we have made other arrests and have prosecuted a number of cases to a successful conclusion.

From what I know of the situation I am convinced that the prosecutions have had a most salutary effect, at least in this district. Of a large number of persons who a few months ago were actively engaged in the importation of alien women and girls for immoral purposes, some are serving sentences of imprisonment, others have forfeited bail and fled, and reliable information which comes to me is to the effect that no inconsiderable number have become so frightened at the prosecutions that they have abandoned their practices, left the city, and gone into other business.

It is also clear that the prosecutions have resulted in greatly reducing the number of alien women harbored in the establishments in the Chicago red-light districts. Information in my possession is to the effect that a considerable number of them have returned to the country whence they came, while others have gone to other States in the United States.

I think I may safely say that the prosecutions we have conducted have resulted in effectually breaking up the traffic in alien girls, at least in this district and for the time being. I have been informed by those who are in position to know that as the result of the prosecutions instituted the value of the establishments in the Chicago red-light districts have depreciated 50 per cent. In addition to a number of establishments which have been closed a considerable number have changed hands. These transfers show that the consideration was much less than the going price of such concerns one year ago.

In this connection I want to express to you my appreciation of the assistance which has been furnished by the Immigration Commission. The information and data furnished us and the assistance given to us by the special agents of the commission were invaluable. The cooperation of the commission made possible the institution and successful prosecution of many of the cases brought in this district. I have always felt that without the aid which the commission was able to give us it would have been impossible for us to have accomplished what has been done.

The cases instituted in this district and the results to date in each case are as follows:

Alphonse and Eva Dufaur; six indictments for harboring six alien women; bail fixed at $25,000; bail forfeited; defendants supposed to have fled to France; place of business in this city abandoned. Our information is to the effect that owing to sacrifices in the disposition of their property, made necessary by their hurried departure, the Dufaurs were put to an expense, including the forfeited bail, of about $80,000. The Dufaurs are supposed to have been among the leading French importers in the United States.

August Duval and Marie Duval were the proprietors of a French restaurant and hotel which was supposed to have been used as a rendezvous for French importers and alien women brought to this country; fined $1,000 and $100 and costs, respectively, on plea of guilty to conspiracy. They have closed up their hotel, disposed of their property, and, I am advised, have returned to France.

Fernand Bocquet, indicted for harboring with the Dufaurs and Duvals; fined $100 and costs.

Henry Lair, indicted for importation and harboring; found guilty on a plea of nolo contendere; sentenced to two years in the penitentiary at Fort Leavenworth and to pay a fine of $2,500. The testimony in the Lair case showed that, in addition to having an agent permanently stationed in Paris, he, each year, sent agents abroad for the purpose of procuring girls. He had establishments in Chicago and San Francisco, making his headquarters at the latter place. The girls who were imported as a result of his activities were distributed at various points in the United States from New York and San Francisco.

Lucienne D'Arville (Mrs. Harry Lair), indicted as an accomplice of Lair; fined $100 on plea of guilty.

Joseph Oschner, indicted for harboring German girl; tried, convicted, and sentenced to two and a half years in the Leavenworth Penitentiary and to pay a fine of $2,500.

Joseph Keller, indicted for harboring Hungarian girls; tried, convicted, and sentenced to eighteen months at Fort Leavenworth Penitentiary and to pay costs.

Louis Ullman, indicted for harboring Hungarian girls; tried, convicted, and sentenced to eighteen months at Fort Leavenworth Penitentiary and to pay costs.

B. H. Markel, alias Barney Markel, in business with Keller and Ullman; evaded arrest and fled. We are advised that he is now in South Africa. The proceedings against Keller, Ullman, and Markel resulted in the closing up of two establishments in the South Chicago districts.

Joseph Bolar, indicted for harboring Hungarian girls; sentenced to thirty days in the house of correction on a plea of guilty. As a result of Bolar's conviction, the place previously operated by him at South Chicago has been closed. Others who were in business with Bolar evaded arrest and fled.

Sol Rubin, indicted for harboring Canadian girl; tried, convicted, and sentenced to nine months in the house of correction and fined $25.

Louis Rosenblum, indicted with Rubin for harboring Canadian girl; fined $400 and sentenced to the house of correction for one day on a plea of guilty.

Matilda Stern, indicted for harboring a French-Canadian girl; tried, convicted, and sentenced to sixty days in the house of correction and to pay a fine of $250.

Joseph Michel, alias "Michel, the Mysterious;" sentenced to two weeks in the house of correction, and fined $2,000 and costs on a plea of guilty to an indictment charging him with harboring French girls. The establishment operated by Michel and his wife was closed up and Michel has gone east and entered legitimate business.

Mariette Michel, indicted in connection with Joseph Michel; sentenced to two days in the house of correction and fined $500 on a plea of guilty.

Andrew Wiborg, tried and convicted for harboring a Danish girl; sentenced to forty-one days in the Cook County jail. The establishment operated by him closed as the result of his conviction.

Barney Rubin, fined $200 on a plea of guilty charging him with harboring Hungarian girl.

Morris Rothstein, fined $200 on a plea of guilty charging him with harboring Hungarian girls.

Rosie Baum, sentenced to ten days in the Cook County jail on a plea of guilty to indictment charging her with harboring Hungarian girl. The establishment operated by her was closed as the result of her conviction.

Isaac Cooperman, tried and convicted of harboring a Canadian girl. Served six months in the county jail.

Isaac Aronson, sentenced to sixty days in the house of correction on a plea of guilty.

Rosie Markel, sentenced to one week in the house of correction and fined $200 and costs on plea of guilty.

Victor Malezan, indicted for harboring Bohemian girl; case not yet tried.

There are also pending in the district three indictments against parties for harboring, who have evaded service.

At the time of the imposition of most of the sentences shown above, the court took into consideration the fact that in many instances the defendant had already spent five or six months in jail in default of bail.

Very truly, yours, EDWIN W. SIMS,
United States Attorney.

APPENDIX I.—*Recommendations of the Immigration Commission in report of December 10, 1909.*

(See Senate Document 196, second session, Sixty-first Congress.)

The commission recommends that the following changes be made in the immigration laws:

1. That section 3 of the immigration act of February 20, 1907, be amended by removing the limitation of three years after the date of landing within which the prostitute or procurer must be found.

Comment.—The evils of the traffic are ordinarily not lessened with the length of time the criminal or prostitute remains in the country.

2. All persons violating the act who have been debarred or deported, if they later return to and attempt to enter the United States, should be declared guilty of misdemeanor and should be punished by imprisonment for not more than two years, and at the expiration of such term be deported.

Comment.—Under our present regulations deported prostitutes return frequently and make further efforts to enter the country, often continuing until they succeed. A penalty would probably prevent these attempts in many cases. The reentry of women once deported is apparently an easy matter. Many of them return again through the port of New York, and some enter by way of Boston, New Orleans, and Quebec. The deportation of a woman is by no means a safeguard against her returning. Many deliberately state that they will return. One prostitute has been deported several times upon information given by a man who several years ago imported her, and to whom she had become a nuisance rather than a source of income. Very frequently the fact that the girl is a prostitute is made known by some man who wishes to be rid of her. Within the month of December, 1908, a French importer, living in San Francisco, offered $500 to anyone who would bring about the deportation of a girl that he had imported two years previous, because he heard that she had intended to testify against him. Another man, whose girl had been sent to the workhouse for six months, stated to one of the agents of the commission that he intended to have her deported at once so that she would be freed of her imprisonment and enabled to return to ply her trade in a much shorter time than if she were allowed to serve her sentence. Not long ago a young girl who had been converted to the Mormon faith landed at Boston. Having admitted that she believed in polygamy, she was immediately deported and a few weeks later was found in Salt Lake City, having entered by way of Canada.

3. The penalties of perjury should be inflicted upon those taking false oath regarding the circumstances connected with these crimes.

Comment.—It is understood that under some of our laws, e. g., the Chinese exclusion act and immigration act, the penalty of perjury is not imposed for taking a false oath. Clearly, if perjury is to be recognized and punished as a crime, it should be recognized and the penalty imposed in these circumstances.

4. The burden of proof regarding the date and place of landing should be placed upon the alien, if those facts are needed.

Comment.—Under the regulations of the Bureau of Immigration, under ordinary circumstances, the burden of proof has rested upon the bureau to prove the date and place of landing. Generally speaking, no hardship would be imposed upon the criminals or prostitutes in question if they were compelled to state the time and place of landing, although under the law as amended this will generally not be necessary. The present rule in many cases defeats absolutely the purpose of the law. The new ruling would very seldom, if ever, be any hardship to any innocent person.

5. The keeping or management of any house of prostitution by an alien, or the taking of all or part of the earnings of any prostitute, should be sufficient cause for deportation of such alien.

Comment.—While the regulations regarding prostitution are ordinarily matters of state legislation, it would seem entirely fitting for the Federal Government to forbid to aliens certain acts injurious to the country under penalty of deportation if they were committed. This seems a case in point.

6. Steamship companies should be required to take back from whence they came all debarred or deported passengers in the same class of passage in which they came to this country.

Comment.—Under present circumstances it will often pay a steamship company financially to take the risk of bringing over a criminal or prostitute first or second class, taking the risk of their deportation, since if they can be returned to their own country at steerage rates a profit will be made. This possibility of securing a profit from criminals and prostitutes who are deported should be removed.

7. Cases should be prosecuted in the district where evidence is most readily secured.

8. The legislatures of the various States should be asked to enact laws requiring the detention of every alien woman convicted under the state laws of practicing prostitution, and further providing for the notification of the Department of Commerce and Labor of such cases, in order that immediate steps may be taken for the deportation of such women.

Comment.—The difficulty of locating a girl convicted of prostitution when she has been discharged, paroled, or fined suggests the advisability of this enactment.

9. The transportation of persons from any State, Territory, or District to another for the purposes of prostitution should be forbidden under heavy penalties.

10. The legislatures of the several States should consider the advisability of enacting more stringent laws regarding prostitution. It is suggested that the Illinois statute regarding pandering be carefully considered.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

F. DREW CAMINETTI, PETITIONER,
v.
THE UNITED STATES. } No. 139.

MAURY I. DIGGS, PETITIONER,
v.
THE UNITED STATES. } No. 163.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

L. T. HAYS, PETITIONER,
v.
THE UNITED STATES. } No. 464.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These cases are before this Court on writs of certiorari.

Caminetti was convicted under the first count of an indictment, charging him with wilfully and knowingly transporting or causing to be trans-

ported, and aiding and assisting in obtaining transportation for, and in transporting, in interstate commerce over the line of the Southern Pacific Railway Company, a common carrier, one Lola Norris,

> for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant. (R., pp. 1 and 6.)

Diggs was convicted under the first four counts of an indictment, the first of which differed from the one under which Caminetti was convicted, only in the name of the girl transported (Marsha Warrington), and the party whose concubine it was intended she should become (Diggs). The second count is similar to the second Caminetti count. The third charged Diggs with obtaining, or causing to be obtained, a railroad ticket whereby Marsha Warrington should be transported in interstate commerce over the line of the Southern Pacific Railway Company, a common carrier, for the purpose of becoming his concubine. The fourth makes a similar charge as to procuring a ticket for Lola Norris that she should become the concubine of Caminetti. (R., pp. 1 and 15.)

Hays was convicted under two counts of an indictment which charged him with inducing, enticing, and coercing a girl under the age of eighteen years to go from one State to another for an immoral purpose, and furnishing her a ticket whereby

she was transported over the line of a common carrier engaged in interstate passenger traffic, thus causing her to be so transported, the said transportation being for the further purpose that the girl should be enticed and coerced to engage in immoral practices. (R. p. 5 and 6.)

QUESTIONS PRESENTED.

Each of the cases presents the following dominant question:

> Whether the White-slave traffic Act of June 25, 1910, 36 Stat. 825, prohibits a person from transporting or causing to be transported a woman or girl over the line of a common carrier engaged in interstate commerce, for the purpose of holding sexual intercourse with said woman or girl.

Numerous other questions of secondary importance raised in the several cases will be later dealt with.

THE STATUTES.

The pertinent provisions are sections 2 and 4 of the White-slave traffic Act of June 25, 1910 (36 Stat. 825), which read as follows:

> SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or

with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the Distict of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, with

the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court.

ARGUMENT.

I.

THE WHITE SLAVE TRAFFIC ACT MAKES IT AN OFFENSE TO TRANSPORT OR CAUSE TO BE TRANSPORTED OVER THE LINE OF A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE, A WOMAN OR GIRL FOR THE PURPOSE OF HAVING ILLICIT SEXUAL INTERCOURSE WITH HER.

The several petitioners contend (1) that the White-slave traffic Act does not make it an offense for a man to take a girl across state lines for the mere purpose of illicit sexual intercourse; and (2) that it could not do so because such a transaction lacks every element of commerce, and so falls without the regulatory power of Congress, which, they say, can only deal with cases of commercialized or coerced vice. Assuming, without conceding, that

under some circumstances a man could take a girl from one state to another for illicit sexual intercourse, without accomplishing interstate commerce, no such question is here presented, because the particular facts in these cases indisputably amount to interstate commerce, and thereby wholly eliminate the supposed constitutional question as to whether these girls were transported or caused to be transported in interstate commerce.

Each indictment charges that the petitioner transported or caused to be transported the girls involved, over the line of a named common carrier engaged in interstate commerce. No supporting decisions are required to the point that a *common carrier* cannot transport a *passenger* from one state to another, except in interstate commerce; or that a passenger, so traveling, is moving in interstate commerce, regardless of his purpose in making the trip. This compels the conclusion that the person furnishing the ticket or otherwise bearing the cost of transportation, whether accompanying the passenger or not, causes such passenger to be transported in interstate commerce, and this result is likewise not dependent upon the purpose of the person furnishing the ticket or otherwise causing the transportation. These propositions are amply supported by the *Minnesota Rate Cases,* 230 U. S. 352, 400, *et seq.,* and cases there cited; *People* v. *Compagnie Gen. Translantique,* 107 U. S. 59; *County of Mobile* v. *Kimball,* 102 U. S. 691, 702;

Covington Bridge Co. v. *Kentucky,* 154 U. S. 204, 218; *Chicago, Rock Island Ry.* v. *Wright,* 239 U. S. 548, 550; *Reid* v. *Colorado,* 187 U. S. 137, 146, 150; *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U. S. 617, 619.

The proposition that, though interstate commerce may be regulated when its purpose is *prostitution,* it may not be regulated when its purpose is merely *illicit sexual intercourse* is untenable, for obviously the two purposes differ not in principle but merely in degree. The *Hoke* and companion cases, 227 U. S. 308, *et seq.,* when properly analyzed, uphold the White-slave traffic Act upon broad principles thus enunciated:

> Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided or transportation induced in interstate commerce for the immoral purposes mentioned. But an objection is made and urged with earnestness. It is said that it is the right and privilege of a person to move between States and that such being the right, another cannot be made guilty of the crime of inducing or assisting or aiding in the exer-

cise of it and " that the motive or intention of the passenger, either before beginning the journey, or during or after completing it, is not a matter of interstate commerce." The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one State to another. Act of February 8, 1897, 29 Stat. 512, c. 172. *United States* v. *Popper,* 98 Fed. Rep. 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. *Lottery Case,* 188 U. S. 321, 357. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise as in the instances stated and which finds further illustration in *Reid* v. *Colorado,* 187 U. S. 137. This constitutes the supreme fallacy of plaintiffs' error. It pervades and vitiates their contentions (320–321).

* * * * *

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independ-

ently or concurrently, to promote the general welfare, material and moral (322).

* * * * *

Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects. It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of June 25, 1910, and we need go no further in the present case.

The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation " among the several States "; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 215; Cooley, Constitutional Limitations, 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress.
a legal exercise of the power of Congress (323).

Illicit sexual intercourse in its essence is either adultery or fornication, according to the marital

status of the parties, and *ejusdem generis* with prostitution, as shown by *United States* v. *Bitty*, 208 U. S. 393, 402, wherein it was said:

> * * * It may be admitted that in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words "any other immoral purpose," must be one of the same general class or kind as the particular purpose of "prostitution" specified in the same clause of the statute. 2 Lewis' Sunderland Stat. Const., § 423, and authorities cited. But that rule cannot avail the accused in this case; for, the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse. We must assume that in using the words "or for any other immoral purpose," Congress had reference to the views commonly entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse. Those views may not be overlooked in determining ques-

tions involving the morality or immorality of sexual intercourse between particular persons.

It follows:

1. That petitioners transported or caused to be transported these girls in interstate commerce.

2. That the immoral purpose for which they transported them is within reach of the commerce power of Congress.

Therefore, the real question requiring determination, is not a constitutional one, but solely one of statutory construction, viz., whether the White-Slave Traffic Act prohibits the transportation of girls in interstate commerce for the mere purpose of illicit sexual intercourse.

The purposes denounced by the statute are, " prostitution or debauchery, or for any other immoral purpose " (sec. 2); and " to induce or coerce her * * * to engage in prostitution or debauchery or any other immoral practice " (sec. 4).

Petitioners insist that the statute be restricted to cases of commercialized vice, but make no suggestion of any possible field in which the words " immoral purpose " or " immoral practice " could then operate. The burden rests upon them to establish that the act should be construed " more narrowly than the plain import of its language." *United States* v. *Barnow,* 239 U. S. 74. They urge that the legislative history of the act, coupled with the provision in section 8 thereof " that this act

shall be known and referred to as the ' White-slave traffic act,' " justify their contention. In none of the cases coming before it under this act, has this court resorted to the legislative history or title as an aid to its interpretation—doubtless, for the obvious reason so well stated in *Mackenzie* v. *Hare,* 239 U. S. 299, 308, as follows:

> * * * It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.
>
> Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language, or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others.

The following illustration used by this court in *United States* v. *Holte,* 236 U. S. 140, 145, lends cogency to the Government's view of the proper construction of the act:

> So we think it would be going too far to say that the defendant could not be guilty in this case. Suppose, for instance, that a pro-

> fessional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York, she would be within the letter of the act of 1910 and we see no reason why the act should not be held to apply. We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim. The words of the statute punish the transportation of a woman for the purpose of prostitution even if she were the first to suggest the crime.

And in *Wilson* v. *United States,* 232 U. S. 563, 571, it was said:

> * * * It is argued that the end and object of the act is to prevent immorality and trafficking in girls, and not the mere act of transportation. But we think that by the plain language of the statute, the offense is complete when " any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia " as a result of any of the criminal acts previously described. * * *

Moreover, the exact contentions of petitioners have been rejected in other Federal courts.

In *Johnson* v. *United States,* 215 Fed. 679, 682, 683, wherein the defendant was charged, among

other things, with transporting a girl for the " immoral purpose of having sexual intercourse with her," the court (7 C. C. A.) said:

> * * * Reference is made to public debates as indicative of the author's intent. But the writer of a bill may explain his purpose to his fellow members, and they may vote for it solely because in their judgment it has a wider or narrower scope than he states. This is one of the considerations that ages ago led to the adoption of the universal primary canon of interpretation that in the absence of ambiguity apparent upon the face of a document extraneous references are not permissible, and the meaning is to be gathered exclusively from the text with the words taken in their ordinary and usual meanings.
>
> A further urge is that the words " prostitution or debauchery or other immoral purpose " do not cover sexual intercourse that is merely unlawful. " Other immoral purpose " are words of such generality that a criminal conviction thereunder could not be tolerated for acts whose purpose was any and every sort of immorality. They must be limited to that genus of which the preceding descriptions are species. Defendant contends that the nexus, the attribute in common, is " commercialized vice "; that a defendant cannot be guilty unless it be shown that he is financially concerned in " the traffic in women." Prostitution, the first species, involves the financial element. But there is no condition in the statute that the furnisher

of transportation shall be guiltless unless he shares in or somehow profits by the hire of the woman's body. And in Hoke's Case, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, a conviction for transporting a woman " for the purpose of prostitution " was upheld without proof that the woman was a " white slave," an article of barter in " the traffic in women," or that the defendant was interested in her earnings. Debauchery, the other named species, is restricted by its association with the first species to sexual debauchery, a leading of a chaste girl into unchastity. No financial element is necessarily involved in sexual debauchery; the statute introduces no such condition; and Athanasaw's Case, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911, teaches that the providing of interstate transportation for the mere purpose of attempting to lead a chaste girl into unchastity is a felony without proof that the defendant intended to be the debaucher, or that he expected to profit by the girl's hire if she should become a prostitute. So it becomes apparent that " commercialized vice " or " the traffic in women for gain " is not the common ground, that the nexus indicative of the genus is sexual immorality, and that fornication and adultery are species of that genus. This conclusion is fortified by United States v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543, where in construing the prohibition of the immigration act against the importation of alien women " for

> the purpose of prostitution or any other immoral purpose," the latter phrase was held to mean unlawful sexual intercourse regardless of financial considerations. See, also, United States v. Flaspoller (D. C.) 205 Fed. 1006, in reference to the White Slave Traffic Act.

In harmony are: *United States* v. *Flaspoller,* 205 Fed. 1006, 1007; *Suslak* v. *United States,* 213 Fed. 913; *United States* v. *Warner,* 188 Fed. 682; *United States* v. *Vaughn,* 209 Fed. 719.

Plaintiffs in error cite no case holding a contrary view.

The logical result of their contention would restrict the application of the statute to cases of prostitution and debauchery, for no other classes of commercialized vice are known. Thus the words "immoral purpose," and "immoral practice" would be rendered impotent, and their insertion in the statute made futile. As stated in *United States* v. *Mescall,* 215 U. S. 26, 31, 32:

> * * * "Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the *genus* there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose."

A more cogent reason for the Government's view is that it effectuates, while the view of petitioners frustrates the claimed purpose of the law. Congress is not to be charged with having trifled with the subject of the suppression of commercialized vice. It dealt with it effectively, and the White-slave traffic act, which stands as the expression of the legislative purpose, must be construed upon that basis, if it may be consistently with the language employed. Unless, therefore, petitioners can establish that the ranks of commercialized vice are recruited *directly* from previously virtuous women and girls, it must be assumed that the words "immoral purpose" and "immoral practice" were intended to reach those immoral purposes and practices which, while not *ex proprio vigore* commercialized vice, were the usual stepping-stones thereto. *Athanasaw* v. *United States,* 227 U. S. 326, 330, 331. A girl indulging even infrequently in illicit sexual intercourse, is a prostitute in the making; and commercialized vice cannot be effectively excluded from channels of interstate commerce, unless its facilities be denied for transporting her for purposes such as here proven and having so strong and natural a tendency to make her an ultimate subject of commercialized vice. To paraphrase language used by this court in *Athanasaw* v. *United States,* 227 U. S. 326, 333, illicit sexual intercourse is an "efficient school" of "the special immorality which defendants contend the statute was designed to cover."

Giving the language of the act its ordinary meaning, it would cover the acts charged against plaintiffs in error. *United States* v. *Bitty,* 208 U. S. 393.

In the last-named case the court interpreted the very language now under consideration, as applied to alien women, and under accepted rules Congress must be held to have adopted that interpretation when it later adopted that language in the White-slave traffic Act.

II.

THE COURT'S INSTRUCTIONS TO THE JURY COVERING THE TESTIMONY OF PLAINTIFF IN ERROR DIGGS, CORRECTLY STATED THE LAW.

Petitioner Diggs attacks the following instruction of the court on the ground that it violates the Fifth Amendment of the Constitution which forbids his being " compelled in any criminal case to be a witness against himself " (R. pp. 71, 232):

> The evidence is all before you, and it is for you to say where the truth rests. The defendant has taken the stand in his own behalf, and, so far as his testimony tends to cover the transaction involved in the charges against him, it is somewhat at variance with that of the two girls, Miss Warrington and Miss Norris; that is, according to his story of their intimacy, he makes it appear that Miss Warrington was apparently pursuing him as much as he was pursuing her, if not more, and he claims that when he suggested the idea of leaving Sacramento alone she

protested that she should not be left behind, but should go with him; and that it was she, and not the defendant, who insisted that Miss Norris should accompany them. Now this conflict, so far as it exists, is for you to determine; that is, you will say whether the statements of these girls are true, or that of the defendant, to the extent that you find it material to determine in order to reach your verdict. The testimony of the defendant, however, does not cover the entire transaction as testified to by the two girls and the other witnesses for the prosecution. After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness-stand. He cannot be compelled to testify at all, and if he fails to

> do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness-stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so.

He contends that a defendant testifying in his own behalf may invoke the Fifth Amendment to prevent the jury from drawing natural adverse inferences from his testimony in the light of the evidence introduced against him by the Government.

If the law does not distinguish between a defendant testifying in his own behalf, and any other witness, it inevitably follows that, while the Fifth Amendment accompanied Diggs into the court room, it deserted him when he took the stand in his own behalf, so that when testifying for himself he could claim no greater privilege than when testifying on behalf of Caminetti.

It should be borne in mind that the privilege against compulsory self-incrimination is not one

protected against State impairment by the Federal Constitution. It is not an ingredient of "due process of law," nor is it one of "the privileges or immunities of citizens of the United States." As it can be invoked only in a Federal tribunal, the Fifth Amendment should not be interpreted so as to accord the privilege to an accused after he has voluntarily become a witness in his own behalf. Neither the language nor the historic setting of the amendment require such a reading, and the effective administration of the criminal law would be seriously hindered thereby. Such a contention would sacrifice "justice and common sense" at "the shrine of mercy." *Wilson* v. *United States,* 162 U. S. 613, 622. In *Twining* v. *New Jersey,* 211 U. S. 78, this court asserts that the privilege is not a fundamental one; but it disposes of the case upon the assumption that in respect of each of the two defendants, neither of whom took the stand, "the jury were instructed that they might draw an unfavorable inference against him from his failure to testify, where it was within his power, in denial of the evidence which tended to incriminate him." It should be noted, too, that "in the State of New Jersey (where the case arose) no person can be compelled to be a witness against himself." *State* v. *Zdanowicz,* 69 N. J. L. 619, 622. In the *Twining* case this court said:

> * * * We think it is manifest, from this review of the origin, growth, extent and limits of the exemption from compulsory

self-incrimination in the English law, that it is not regarded as a part of the law of the land of Magna Carta or the due process of law, which has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process (105–106).

* * * * *

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it can not be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. See Wigmore, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law (113).

We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not in-

tend, however, to lend any countenance to the truth of the assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see *Reg.* v. *Rhodes* (1899), 1 Q. B. 77; Ex parte Kops (1894) A. C. 650 (114).

A. Decisions of the Federal courts.

We now pass to an analysis of the decisions of this and other Federal courts interpreting the scope of the privilege against compulsory self-incrimination.

In *Reagan* v. *United States,* 157 U. S. 301, 305, disposing of an objection to an instruction to the jury to consider among other things the interest of the defendant in the outcome of the case, this court said:

> On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. * * * His credibility may be impeached, and by the same methods as are pursued in the case of any other witness. The jury properly consider his manner of testifying, the inherent probabilities of his story, the

amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence in determining how much of credence he is entitled to.

To the same effect is *Johnson* v. *United States,* 157 U. S. 320.

In *Brown* v. *Walker,* 161 U. S. 591, 597, speaking of the exceptions to the rule against compulsory self-incrimination, this court said:

> 1. Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for the parties, and discloses his criminality, he is not permitted to stop, but must go on and make a full disclosure. 1 Greenl. Ev. sec. 451; *Dixon* v. *Vale,* 1 C. & P. 278; *East* v. *Chapman,* 2 C. & P. 570; S. C. M. & M. 46; *State* v. *K————,* 4 N. H. 562; *Low* v. *Mitchell,* 18 Maine, 372; *Coburn* v. *Odell,* 10 Fost. (N. H.) 540; *Norfolk* v. *Gaylord,* 28 Connecticut, 309; *Austin* v. *Poiner,* 1 Sim. 348; *Commonwealth* v. *Pratt,* 126 Mass. 462; *Chamberlain* v. *Willson,* 12 Vermont, 491; *Lockett* v. *State,* 63 Alabama, 5; *People* v. *Freshour,* 55 California, 375.
>
> So, under modern statutes permitting accused persons to take the stand in their own behalf, they may be subjected to cross-examination upon their statements. *State* v. *Wentworth,* 65 Maine, 234; *State* v. *Witham,* 72 Maine, 531; *State* v. *Ober,* 52 N. H. 492; *Commonwealth* v. *Bonner,* 97 Mass. 587;

Commonwealth v. *Morgan,* 107 Mass. 199; *Commonwealth* v. *Mullen,* 97 Mass. 545; *Connors* v. *People,* 50 N. Y. 240; *People* v. *Casey,* 72 N. Y. 393.

In *Wilson* v. *United States,* 162 U. S. 613, 620, 621, upholding the instructions there given to the jury relative to the burden assumed by a defendant witness, this court said:

> Again, the existence of blood stains at or near a place where violence has been inflicted is always relevant and admissible in evidence. Wharton Crim. Ev. § 778; *Commonwealth* v. *Sturtivant,* 117 Mass. 122. The trial judge left it to the jury, if they found that there were blood stains and that the defendant had not satisfactorily explained them, to draw the inference, in the exercise of their judgment, that there was an act of deadly violence perpetrated against a person while upon or connected with the bed clothing. In other words, that the jury might regard blood stains not satisfactorily explained as a circumstance in determining whether or not a murder had been committed.
>
> Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by defendant, or on his behalf, at his instigation, they had the right not only to take such statements into consideration in connection with all the other circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by

him upon the theory of his innocence, but also to regard false statements in explanation or defence made or procured to be made as in themselves tending to show guilt. The destruction, suppression or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury. 1 Greenl. § 37; 3 Id. § 34; *Commonwealth* v. *Webster,* 5 Cush. 295.

The testimony of the defendant in a criminal case is to be considered and weighed by the jury, taking all the evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have. *Hicks* v. *United States,* 150 U. S. 442, 452; *Allison* v. *United States,* 160 U. S. 203. The trial judge did not charge the jury to treat the testimony of defendant in a manner different from that in which they treated the testimony of other witnesses, and left it to them to give to his evidence, under all the circumstances affecting its credibility and weight, such consideration as they thought it entitled to receive.

We cannot reverse this judgment for error in either of the instructions complained of.

In *Fitzpatrick* v. *United States,* 178 U. S. 304, 315, objection was made against the cross-examination of the defendant. Holding the cross-examination proper, this court said:

Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution

has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the Government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defence, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury, *State* v. *Ober,* 52 N. H. 459; and it is also held in a large number of cases that

> when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. * * *

In *Sawyer* v. *United States,* 202 U. S. 150, 165, disposing of a similar objection this court said:

> It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime. *Fitzpatrick* v. *United States,* 178 U. S. 304.

In *Powers* v. *United States,* 223 U. S. 303, 314, it was said:

> As to the contention that the cross-examination before the commissioner shown in the bill of exceptions was improperly extorted from the witness under threat of commitment, an examination of the bill of exceptions, we think, requires an answer overruling this exception. There is some difference of opinion expressed in the authorities, but the rule recognized in this court is that a defendant, who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination concerning his statement. "Assuming the position of a witness, he is entitled to all its rights and protection, and is subject to all its criticisms and burdens" and may be fully cross-examined as to the testimony volun-

tarily given. *Reagan* v. *United States,* 157 U. S. 301, 305. The rule is thus stated in *Brown* v. *Walker,* 161 U. S. 591, 597: * * *.

More directly in point is *Graves* v. *United States,* 150 U. S. 118, wherein the question arose whether it was error for the district attorney to comment to the jury upon the failure of the accused to produce his wife as a witness. While this court held error had been committed, it did so because the wife, even if present, could not have been compelled either by the Government or the defendant to take the stand. This court said, however:

> Had the wife been a competent witness, the comments upon her absence would have been less objectionable. It was said by Chief Justice Shaw in the case of Commonwealth v. Webster, 5 Cush. 295, 316: "But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he can offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to support the charge." The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do

> it creates the presumption that the testimony, if produced, would be unfavorable. 1 *Starkie on Evidence,* 54; *People* v. *Hovey,* 92 N. Y. 554, 559; *Mercer* v. *State,* 17 Tex. App. 452, 467; *Gordon* v. *People,* 33 N. Y. 501, 508 (120–121).

The principle established by this court in the foregoing cases, is that a defendant testifying in his own behalf stands upon the same plane before the law, as any other witness, and the Fifth Amendment confers upon him, while so testifying, no superior rights.

In *Jacobs* v. *United States,* 161 Fed. 694, the Circuit Court of Appeals for the First Circuit, dealing with a question involving the cross-examination of the accused, said:

> * * * The waiver of the constitutional provision concerns merely the personal conduct and condition of the witness. He offers himself as a witness, and therefore puts himself in the position of any other witness so far that he may be examined with reference to anything pertinent to the case and admissible in evidence therein. * * *

In *Franklin* v. *United States,* 193 Fed. 334, 342, the Circuit Court of Appeals for the Third Circuit said:

> The next assignment was to the court's permitting the defendant Charles Franklin, on cross-examination, to be asked if his license as a court detective of Erie county had not been taken from him. We find no

error in this regard. The scope of cross-examination of a defendant who goes upon the stand may take, in the discretion of a trial judge, considerable latitude. We cannot say that latitude was here exceeded. The question of Franklin's animosity toward the Strongs, who had insisted on his being retired from the work, was involved in the case, and cross-examination which tended to show that his license had been revoked after a judicial investigation brought about by an article published in a newspaper owned by Mr. Strong was pertinent, in connection with other proven expressions of his feelings toward them, as showing animosity against them.

B. Decisions of the State courts.

The rulings of the State courts on the question here in issue are thus concretely stated in 2 Ruling Case Law, p. 432:

> The constitutional privilege of the accused in a criminal trial, not to have his failure to testify commented on by the prosecuting attorney, is waived where he takes the witness stand voluntarily for the purpose of giving testimony in his own behalf. By electing to testify, he places himself in the attitude of any ordinary witness, irrespective of any interest in the cause. As a party, his refusal to answer a particular question, on the ground that such answer would tend to criminate him, could afford him no exemption from the inferences which would naturally

> attach to any other witness, not a party, in such circumstances. His object in taking the witness stand is to show himself innocent of the offense by testifying. Putting himself in such a position, and declining to testify except as to such matters as would tend to exculpate him, refusing to answer the direct, competent and material inquiry raised by the case, is a matter of significance which it is the right, if not the duty, of a prosecuting attorney and of the court to bring prominently to the attention of the jury. * * *

See also note to *Wilson* v. *United States,* 40 U. S. Sup. Ct. Rep. L. ed. 1092; and note to *People* v. *Tice,* 15 L. R. A. 670 et seq.

In Wigmore on Evidence, vol. 4, p. 3149, the applicable rule is thus stated:

> His failure in his testimony to deny or explain the evidence against him which he might naturally have explained is therefore open to inference; and this must be so, however narrowly the extent of the waiver be interpreted. Furthermore where the party refuses answer and claims privilege as to the matter which is in truth included in the waiver, but the answer is not insisted upon, the inference is of course available.

In Wharton's Criminal Evidence (10th edition), vol. 1, pp. 907 and 915, the author states:

> § 432. *Accused; extent of waiver of privilege against self-crimination.*—If the accused offers himself as a witness to disprove a criminal charge, can he excuse himself

> from answering on the ground that, by so doing, he would criminate himself? The sound rule, and adhered to in most states, is that, so far as concerns questions touching the merits of the offense on trial, the accused, by offering himself as a witness to disprove the charge, waives his privilege as to all relevant facts connected with the offense, except those facts that merely affect his credibility.
>
> * * * * *
>
> This protection from comment does not apply in those cases in which the accused, submitting himself as a witness, declines to answer particular questions on the ground of self-crimination, or fails to explain inculpatory facts, and in such case counsel may comment fully not only on his testimony, but on his appearance and manner when testifying, as well as his failure to produce certain testimony and particular witnesses; and where the wife of accused is by statute made a competent witness, comment may be made on his failure to call her, * * *.

See also the exhaustive treatment of the subject in the opinion of the Circuit Court of Appeals in the Diggs case. (R. pp. 266 and 305; 220 Fed. 548 to 551.)

To support their contention as to the scope of the Fifth Amendment, plaintiffs in error rely upon *Balliet* v. *United States,* 129 Fed. 689, 695. Without attempting an analysis of the opinion in that case, if it be capable of any such construction it is out of harmony not only with the cases herein-

before reviewed, but also such cases as *Kirby* v. *Tallmadge,* 160 U. S. 379, 383; *In re Kellogg,* 113 Fed. 120, 130.

The related objection of Diggs to alleged improper cross-examination of himself, is so satisfactorily dealt with by the circuit court of appeals as to make useless further discussion of the point in this brief. See R. pp. 271, 272, 303, 304. (220 Fed. 553, 554.)

III.

FAILURE OF THE COURT TO INSTRUCT JURY THAT THE TESTIMONY OF ACCOMPLICES MUST NOT ONLY BE CORROBORATED, BUT ALSO RECEIVED WITH "GREAT CARE AND CAUTION," DOES NOT CONSTITUTE REVERSIBLE ERROR.

Petitioner Diggs asserts that the trial court erred in refusing to instruct the jury, that the testimony of accomplices must not only be corroborated, but must be received with "great care and caution." (R. p. 54, Assignments 110 to 113, inclusive.)

1. Had the girls been accomplices, no legal duty rested upon the court to give the requested or any similar instructions. While some decisions hold it to be the better "practice" to give appropriate instructions to the jury in such cases, it is believed none go to the extent of requiring such instructions as matter of law, and treating the failure to give them as reversible error.

Under *Holmgren* v. *United States,* 217 U. S. 509, 523, and the frank concession of Diggs in the Circuit Court of Appeals that in the Federal courts a

person may be convicted upon the uncorroborated testimony of an accomplice, his assignments of error 112 and 113 are clearly bad, as the instructions asked could not have been given as framed. Assignments of error 110 and 111 contain only abstract propositions, and are furthermore open to the objection of being too general and indefinite. *Agnew* v. *United States,* 165 U. S. 36, 52; *United States* v. *Jones,* 8 Pet. 399, 414, 415; *Winn* v. *Patterson,* 9 Pet. 663, 678; *United States* v. *Bank of the Metropolis,* 15 Pet. 377, 406; *Chicago, Burlington & Quincy Railroad* v. *Chicago,* 166 U. S. 226, 257; *Springer* v. *United States,* 102 U. S. 586, 594. The case is thus reduced to one in which no proper instruction was requested, and is directly controlled by *Holmgren* v. *United States,* 217 U. S. 509, 523, in which this court declined to reverse, although the trial court did not give a proper instruction of its own motion as it is here contended it was the duty of the court to do. This court merely said:

> It is undoubtedly *the better practice* for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them.

Other cases supporting the view that the trial court is not under legal duty to give special instructions regarding the testimony of accomplices, are: *United States* v. *Ybanez,* 53 Fed. 536, 540; *Richardson* v. *United States,* 181 Fed. 1, 9; *Hanley* v. *United States,* 123 Fed. 849; *Wong Din* v. *United*

States, 135 Fed. 702; *Hee* v. *United States,* 223 Fed. 732, 735; *Commonwealth* v. *Clune,* 162 Mass. 206, 214; *Commonwealth* v. *Holmes,* 127 Mass. 424; *Commonwealth* v. *Wilson,* 152 Mass. 12; *Solander* v. *People,* 2 Colo. 48; *Cheatham* v. *State,* 67 Miss. 335, 344. Bishop, New Criminal Procedure, vol. 2, par. 1169; Phillips, Evidence, vol. 1, p. 91.

2. Conceding *arguendo* that the duty did rest upon the trial court to give appropriate instructions to the jury regarding the testimony of accomplices, it is the contention of the Government that, under the evidence in the Diggs case, the following instruction given to the jury, amply meets the requirement (R. pp. 228, 229):

> In determining the credibility of a witness you will bear in mind that every witness is presumed to speak the truth; but this presumption may be overcome by the manner in which he testifies or the character of his testimony. The jury should take into consideration his character and conduct as disclosed, *his relation to the controversy* and to the parties, if any, his expressed or *apparent bias or partiality, the reasonableness or unreasonableness* of the statements he makes, and all other elements which tend to throw light upon his credibility. * * * *And from all these considerations you determine the weight which you will give to the testimony of any witness.*

3. Finally, the record discloses corroboration of the testimony of the girls involved in the Diggs case, so that the failure, if any, to give proper accomplice

instructions to the jury did not prejudice, and therefore could not constitute reversible error. *Agnew* v. *United States,* 165 U. S. 36; *Connors* v. *United States,* 158 U. S. 408, 411; *Kanawha & M. R. Co.* v. *Kerse,* 239 U. S. 576.

As showing corroboration, there was evidence tending to show that Diggs sought to induce Miss Warrington to falsely tell the officers that she and Miss Norris occupied one room and that the two men occupied the other, though one of the men and a girl occupied each room. R. pp. 124, 129, 144, 168. Futhermore, Miss Warrington and Miss Norris testified as to the details of the arrangements made by Diggs, and by the "four-some", after they boarded the train at Sacramento en route to Reno. R. pp. 142, 165. Many of these details were corroborated by the Pullman conductor and by the porter. R. pp. 113 and 115. The time of the departure of the train, as alleged by Miss Norris was corroborated by the conductor. R. pp. 113, 165. Miss Norris also testified that at the Riverside hotel in Reno, Diggs assumed the name of Enright, and Caminetti assumed the name of Ross. This was corroborated by the clerk of the hotel. R. pp. 116, 117.

IV.

THE TRIAL COURT DID NOT TREAT THE CASE AS INVOLVING A CHARGE OF INTERSTATE TRANSPORTATION FOR THE PURPOSE OF DEBAUCHERY.

Petitioner Diggs alleges that while the indictment charges him with transporting the girls to become concubines, the trial court, in its charge,

dealt with the case as one of transportation for the purpose of debauchery. The contention is devoid of merit, and only vaguely sustainable by relying upon detached portions of the charge. It is elementary that the charge must be read as a whole. *Spring Co.* v. *Edgar,* 99 U. S. 645, 659; *Ewing* v. *Burnet,* 11 Pet. 41, 54.

When so read, it appears that the offense was fairly and accurately stated to the jury. R. pp. 221, et seq.

Conceding his contention, no prejudice could be shown under the evidence, so that the error, if any, would be harmless. See also the opinion of the Circuit Court of Appeals upon this point. R. p. 276; 220 Fed. 558–559.

V.

THE INTRODUCTION OF A CERTAIN SHEET IN EVIDENCE WAS NOT OPEN TO OBJECTION.

Petitioner Diggs excepts to the use as evidence of a certain blood-stained sheet. This was taken from the bed occupied by Caminetti and Lola Norris by the latter and hidden in a closet; and the purpose of its introduction was to establish acts of sexual intercourse. (R. pp. 124, 136, 137.)

Diggs contends that the sheet was introduced for the purpose of creating a belief that Lola Norris had been seduced; that her subsequent testimony showed otherwise, and rendered the evidence irrelevant.

Government counsel frankly stated (R. p. 219) that he did not contend that the stains were due to

anything but menstrual flow; but the sheet was still a proper item of circumstantial evidence in establishing the nature of the room-occupancy. Wide latitude is permitted in the introduction of such evidence. *Thiede* v. *Utah,* 159 U. S. 510, 518.

Clearly the objection that the sheet came from the bed room of Caminetti and Lola Norris rather than that of Diggs and Marsha Warrington (Diggs' brief p. 143), begs the question. Confessedly Diggs bought all of the tickets (as he claimed and now claims with the sole purpose of escaping to Nevada to avoid arrest and scandal; or if for any other purpose, such purpose was framed after the tickets were bought). (Diggs' brief p. 88). The Government contended that one distinct purpose was to enable them to continue illicit relations without arrest or other interruption. The blood stains on the sheet, gown and cloth justified the inference that sexual excitement near the menstrual period may have produced the menstrual flow that night; and the relations between the occupants of the North room may be fairly inferred to have represented the relations between the occupants of the other room of the bungalow.

Moreover relations in which barriers of modesty in woman are broken down are not established in a single night, and in addition to being part of the *res gestae* as affecting what transpired in the bungalow, it tended to evidence that the occupancy by the four of the two berths in the Pullman had not been platonic as Lola Norris had said (R. p. 168).

It also reinforced in this regard, the undisputed evidence dealing with the preferred selection by Diggs of the drawing room rather than separate sections in the open car during the very period of the transportation.

The record will be searched in vain for any showing of improper use of this item of evidence, or that it was unduly emphasized, and the objection must therefore fail for lack of merit.

VI.

THE RECORD SHOWS NO SUCH MISCONDUCT OF COUNSEL AS WOULD CONSTITUTE REVERSIBLE ERROR.

Petitioner Diggs alleges misconduct of Government counsel in their opening and closing arguments to the jury.

The merit of the contention is destroyed by the following excerpt from the court's charge covering the point:

> * * * I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness stand or in the way of exhibits or other physical objects which may have gone in before you.
>
> * * * * * * *
>
> Perhaps I should again admonish you that to no extent must you permit yourselves to be influenced in your verdict by the fact that this case has attracted so much attention

> and given rise to so much controversy in the public press, the halls of Congress, and among the people, prior to this trial, by reason of certain incidents arising in its earlier history. Those facts are wholly extraneous to your inquiry or mine, and we have nothing whatsoever to do with them. They in no way affect the merits of the case, and you should be careful to avoid permitting any feeling of bias or prejudice flowing therefrom to find reflection in your verdict (234).
>
> * * * * * * *
>
> You will please give me your attention. I am about to state to you the principles of law that apply in this case, and when I have done so it will be your duty to observe them to the *exclusion of any suggestions that may have emanated from counsel or come to you from any other source* (221).

Not only so, but the court carefully admonished counsel from time to time to confine their remarks to the evidence. (R. pp. 49, 219, 220.)

As so well stated in *Dunlop* v. *United States*, 165 U. S. 486, 498:

> If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.

It is plain that no possible prejudice resulted.

VII.

DENIAL OF RIGHT TO ASK CERTAIN QUESTIONS OF TALESMEN, NOT OPEN TO OBJECTION.

Petitioner Diggs takes exception to the action of the trial judge in restricting his examination of talesmen. The objection is unworthy of serious consideration in the light of the record, and the wide discretion which necessarily must be exercised by the judge. R. pp. 86 *et seq.* See *Connors* v. *United States,* 158 U. S. 408, 413; *Richards* v. *United States,* 175 Fed. 911.

There is no contention that the jury, as finally sworn, was not a fair and impartial one, and after verdict this is all that can reasonably be required. As stated in *Brown* v. *New Jersey,* 175 U. S. 172, 175:

> The manner of selection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury.

It is clear that no prejudice resulted.

VIII.

NO ERROR WAS COMMITTED IN REFUSING MOTION TO TRANSFER CASE FROM SAN FRANCISCO TO SACRAMENTO FOR TRIAL.

Petitioner Diggs alleges error in the refusal of his motion to transfer the case for trial from San Francisco to Sacramento. The record (pp. 80 *et seq.*) discloses that the discretion exercised by the court is free from criticism. See *Kennon* v. *Gil-*

mer, 131 U. S. 22, 24. Counsel in their motion conceded that the matter was one of discretion.

Moreover, under section 72 of the Judicial Code, the Northern District of California contains but one division, and under section 53 of the same code the right of a defendant to move for a transfer is restricted to districts containing more than one division, and the granting of such motions even then is not made mandatory.

IX.

OTHER ERRORS ASSIGNED.

The remaining assignments of error upon which Diggs relies relate to instructions given and refused, and can be dealt with in few words.

1. Requested instructions embodied in assignment of error 109 (R. pp. 54, 235, 239; Diggs' brief p. 213), relative to the motive, influence, and immunity of the witness, Marsha Warrington, is bad for two reason: (1) It singles out one witness; and (2) is bedded upon no evidence, inferential or otherwise. *Coffin* v. *United States,* 162 U. S. 664, 675, 677; *Perovich* v. *United States,* 205 U. S. 86, 92.

Furthermore, the matter was adequately covered by the charge as given. (R. p. 228.)

2. Requested instructions set forth in assignments of error 101, 105, 106, 107, which relate to circumstantial evidence, etc. (R. pp. 51, 66, 235–249; Diggs' brief p. 215), were likewise amply covered in the charge as given. (R. pp. 225, 227.)

3. Requested instructions embodied in assignments of error 116 to 134, 150 to 152, and 154 (R. pp. 56-62, 67-69, 235, 245; Diggs' Brief p. 223), which relate to the intent of the accused, are also amply covered by the charge as given. (R. pp. 225, 226, 233.) See on refusal of instructions *Coffin* v. *United States,* 162 U. S. 664, 672.

4. The complaint that the trial court failed to properly instruct the jury on " reasonable doubt " must fall when the charge of the court is examined. (R. p. 227, 234.)

5. The complaint levelled against that portion of the charge (R. p. 232) wherein the court instructed the jury, in substance, that the evidence, if believed by them, was sufficient to sustain conviction under all of the counts of the indictment, is wholly without merit, for the instruction but represents the view which the court could well have expressed in overruling a motion for a directed verdict. Obviously the question whether the evidence, if believed by the jury, makes out a case under the applicable statute, is a pure question of law for the court to decide. *Sparf* v. *United States,* 156 U. S. 51. The instruction is also good under the rule which permits a court to express its opinion to the jury on the evidence. *Allis* v. *United States,* 155 U. S. 117, 123.

Breese v. *United States,* 108 Fed. 804, cited by Diggs to the contrary, is wholly inapposite, as an examination of the particular instruction there complained of will disclose.

X.

INDICTMENT IN HAYS CASE NOT OPEN TO ATTACK.

Petitioner Hays seeks, for the first time in this court, to attack the form of the indictment under which he was convicted. He alleges that the indictment which charges him with having transported etc. the girl with the intent to induce her to give herself up to "prostitution and debauchery and other immoral practices," should have specified the particular acts constituting the immoral practices.

The objection comes too late. It was not urged either in the trial court or in the Circuit Court of Appeals. *Allis* v. *United States,* 155 U. S. 117, 120. Furthermore, no bill of particulars was asked for, and the record abounds with evidence that the accused fully understood the charge alleged against him, and was thereby enabled to properly prepare his defense. That is all that could be demanded, especially at this stage. *Bartell* v. *United States,* 227 U. S. 427, 433; *Ledbetter* v. *United States,* 170 U. S. 606, 612; *Durland* v. *United States,* 161 U. S. 306, 315. As so well said in *Grant Brothers* v. *United States,* 232 U. S. 647, 661:

> The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. *San Juan Light Co.* v. *Requena,* 224 U. S. 89, 96; *Campbell* v. *United States,* id. 99, 106.

XI.

REQUESTED ACCOMPLICE INSTRUCTIONS PROPERLY REFUSED.

Petitioner Hays further complains of the refusal of the court to give his requested instructions covering the alleged accomplice testimony of the girl whom he transported.

The objection seems to have been adequately disposed of by the Circuit Court of Appeals as follows (R. p. 129; 231 Fed. 106, 110):

> The ruling was clearly right. The request as framed by counsel was improper upon two grounds. First, the girl was not an accomplice. *United States* v. *Holte,* 236 U. S. 140, 145; *Diggs* v. *United States,* 220 Fed. 545, 553. Second, even if she were an accomplice, the request as framed states the requirements much too strongly. The admonition given by the court adequately safe-guarded defendant's rights. There is no precise formula which must be observed in the Federal courts. They are not bound by state statutes on the subject. The admonition to be given is a matter of caution and not a hard and fast rule of law. *Hanley* v. *United States,* 123 Fed. 849. The language used may properly be varied to some extent according to the degree of criminality of the accomplice and the circumstances under which he testifies. Wigmore on Evidence, Sec. 2057.

See also the discussion of the same point under heading III of this brief.

CONCLUSION.

An impartial examination of all the records establishes that petitioners had fair trials free from reversible error, and it is therefore respectfully submitted that the judgments should be affirmed.

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gain, either as a motive for the transportation or as an attendant of its object, is not an element in the offenses defined.

As so read the act is constitutional.

When the language of a statute is plain and does not lead to absurd or impracticable results, there is no occasion or excuse for judicial construction; the language must then be accepted by the courts as the sole evidence of the ultimate legislative intent, and the courts have no function but to apply and enforce the statute accordingly.

Statutory words are presumed, unless the contrary appears, to be used in their ordinary sense, with the meaning commonly attributed to them.

When an act provides that it shall be known and referred to by a designated name, the name can not be made the means of overriding the plain meaning of its other provisions.

The reports of congressional committees may be resorted to by the courts when the legislation to which they relate is doubtful and requires interpretation.

The meaning which this court had attributed to the words "any other immoral purpose" as used in the act concerning the importation of alien women, Act of February 20, 1907, c. 1134, 34 Stat. 898, 899, Congress must be presumed to have known when it employed the same words in a similar association in the White Slave Traffic Act.

The power of Congress under the commerce clause, including as it does authority to regulate the interstate transportation of passengers and to keep the channels of interstate commerce free from immoral and injurious uses, enables it to forbid the interstate transportation of women and girls for the immoral purposes of which the petitioners were convicted in these cases.

When an accused person voluntarily testifies in his own behalf and omits to deny or explain incriminating circumstances and events already in evidence in which he participated and concerning which he is fully informed, his silence subjects him to the inferences naturally to be drawn from it, and an instruction to that effect does not violate his rights under the Fifth Amendment or the Act of March 16, 1878, c. 37, 20 Stat. 30.

While it is the better practice in criminal cases for courts to caution juries against too much reliance on the testimony of accomplices and against believing such testimony without corroboration, mere failure to give such an instruction is not reversible error.

220 Fed. Rep. 545; 231 Fed. Rep. 106, affirmed.

THE cases are stated in the opinion.

Mr. Joseph W. Bailey, with whom *Mr. Marshall B. Woodworth* and *Mr. Robert T. Devlin* were on the brief, for petitioner in No. 163:

It was error to charge the jury that they might draw inferences against the defendant Diggs, from his failure to deny or explain incriminating acts in evidence. Constitution, Article V; Act of March 15, 1878, c. 37, 20 Stat. 30; *Balliet* v. *United States*, 129 Fed. Rep. 689, 696; *Myrick* v. *United States* and *Cunningham* v. *United States*, 219 Fed. Rep. 1; *Boyd* v. *United States*, 116 U. S. 616. In the United States courts and in the courts of some of the States, independently of statute, and especially in California, the right of cross-examination is restricted to matters inquired of in chief. Where a defendant does not go into a subject, but leaves it as the prosecution left it, the case as made against him derives no support from his silence. The fact, therefore, that defendant went upon the stand in this case did not justify the instructions complained of.

The practical effect was erroneously to contradict the presumption of innocence and shift the burden of proof.

The evidence authorized the jury to conclude that the women were accomplices. Cyc., vol. 12, pp. 447, 448, and cases cited; *People* v. *Coffey*, 161 California, 433, 447; *United States* v. *Holte*, 236 U. S. 140. It was the duty of the trial court to submit that question and to caution the jury. Cyc., vol. 12, p. 453; *Crawford* v. *United States*, 212 U. S. 183, 204, and numerous other cases. A refusal so to instruct is ground for reversal. *Solander* v. *People*, 2 Colorado, 48; *Cheatham* v. *State*, 67 Mississippi, 335; *People* v. *Sternberg*, 111 California, 11; *People* v. *Strybe*, 36 Pac. Rep. 3; *People* v. *Bonney*, 98 California, 278; Penal Code of California, § 1111; *Martin* v. *State*, 36 S. W. Rep. 587; Cyc., vol. 12, pp. 458, 459, and cases cited.

The issue should have been confined to the specific allegation of purpose, viz., that the woman was to become the defendant's concubine or mistress, which controls the

general terms "debauchery" and "other immoral purposes," in the indictment. For the meaning of "debauchery" see *State* v. *Reeves*, 97 Missouri, 668; *Suslak* v. *United States*, 213 Fed. Rep. 913, 917; *Athanasaw* v. *United States*, 227 U. S. 326. It is unnecessary for us to particularize the many indecent practices that come under the head of "debauchery" and "other immoral practices." It was for the purpose of reaching these that the act was passed.

See: "The Battle with the Slums," pp. 69–75, by Jacob A. Riis, N. Y., The Macmillan Company, 1902.

The case should be reversed for introduction of improper evidence and misconduct of counsel at the trial.

The trial court erred in compelling the defendant on cross-examination to go beyond his direct examination.

The White Slave Traffic Act is unconstitutional if extended to cases where no element of profit exists. *New York* v. *Miln*, 11 Pet. 102; *License Cases*, 5 How. 599; *Bowman* v. *Chicago &c. R. Co.*, 125 U. S. 489; *Lemon* v. *People*, 26 Barbour (N. Y.), 270, affirmed in 20 N. Y. 562; *Welton* v. *Missouri*, 91 U. S. 275; *Hall* v. *DeCuir*, 95 U. S. 485; *Weber* v. *Virginia*, 103 U. S. 344; *Passenger Cases*, 7 How. 283; *King* v. *American Transportation Co.*, 14 Fed. Cases, 512; *Boyse* v. *Anderson*, 2 Pet. 150. All cases heretofore upholding the law have involved actual traffic in women for gain. This traffic, as the court knows judicially, became so menacing that a conference of nations was convened at Paris, July 25, 1902, to concert measures of suppression. The resulting agreement was proclaimed by the President June 18, 1908, 35 Stat. pt. 2, 1979–1984. This the act of Congress was intended to effectuate. The nature of the white slave traffic and the meanings of the term are generally and judicially known. See New Standard Dictionary; *United States* v. *Hoke*, 187 Fed. Rep. 992, 1002. The court should take cognizance of the evil aimed at by the act. The Paris agreement, the proclamation, the

act itself in the title and §§ 6 and 8, and the committee's report all demonstrate that commercial traffic alone was in view. Commerce in the Constitution implies traffic and gain. Congress cannot regulate morals and thus usurp the state police power by forbidding the mere passage or transportation of passengers.

The following is a condensation of *Mr. Bailey's* petition for rehearing in the Caminetti Case.

The White Slave Traffic Act does not apply to the uncontested facts of this case. The question here is whether the purpose of Caminetti, being free from every element of coercion and commercialism, is within the prohibition of the statute. It is a question of classification, rather than of words. An act might be clearly within the language of a statute directed against voluntary vice, and yet that identical act would not be within precisely the same words in a statute directed against involuntary vice. Before we can decide whether a particular act is within the words of a statute, we must first decide whether the class of acts to which the particular act belongs is within the purpose of the statute. This principle of construction was sanctioned by this court in *Holy Trinity Church* v. *United States*, 143 U. S. 457, and the rule there announced has been received by the bench and bar as the law of the land for more than twenty years. In that case the court held that although the contract of employment was within the letter of the law, emphasized by particular expression, as well as by certain exceptions, Congress intended only to legislate against the importation of manual laborers under contract, and intellectual laborers were not within the statute. Here we say that Congress intended to legislate only against commercialized vice, and no conduct, however immoral, which is free from coercion and commercialism, is within the statute.

How did this court reach the conclusion that the Contract Labor Law includes only those who work with their hands, and not those who work with their brain? It did so by taking into account the title of the act, the evils which it was sought to remedy, the circumstances surrounding the appeal to Congress, and the report of the committee recommending its enactment. If it was proper to consider such matters in ascertaining the scope of a law which enforces its prohibitions by moderate fines, certainly the same course is even more proper with respect to a law which makes the citizen who violates it a felon; and as this court consulted the committee report in construing the Contract Labor Law, *a fortiori* it ought to adopt the same method in construing the White Slave Traffic Act, which, as it has been construed in this case, is the most drastic criminal law ever enacted by the American Congress. If there be any difference, the language was plainer in that case than in this. As there are no exceptions to accentuate the inclusion of all classes not specially excepted, we are justified in thinking that, even more than in the other case, the court ought to consider the report of the committee which prepared the White Slave Traffic Act.

The rule for construing statutes as announced in the *Holy Trinity Church Case* was not modified by the decision in *United States* v. *Bitty*, 208 U. S. 391. There was a difference in the facts of the two cases, and not any difference in the logic of the court. In the first case the court held that the contract was not within the statute, because, although within the letter of it, it was not within the purpose of it; and in the second case the court held that the offense was within the statute, because it was within both the letter and the purpose of it.

The court did not, in *United States* v. *Bitty*, consider the report of a congressional committee, for the very sufficient reason that there was no report from which the court

could have extracted the real meaning of the later law. If this court gathered the intention of Congress from the words of the statute in the Bitty case, it nevertheless sought the meaning of those words in the history of that statute. Mr. Justice Harlan devoted the first part of his opinion to a review of the legislation, which began with the Act of March 3, 1875—that being the first law which prohibited the importation of alien prostitutes—was followed by the Act of March 3, 1903, which still further enlarged the prohibitions, and culminated in the Act of February 20, 1907, where the words "or for any other immoral purpose" first appear. Those previous acts were reproduced in order to show by the successive changes in the law the purpose which Congress had in mind. I cannot perceive any difference in principle between investigating the history of a law and examining the report of a committee for the purpose of ascertaining whether Congress intended that the statute should include a certain class of persons or offenses.

Section 1 must be read in connection with § 8. Congress had some purpose in giving the statute a name, and the only imaginable purpose was to indicate the character of offenses which it was intended to punish. We must, therefore, so read the entire act as to give effect to that purpose, or we must find some other purpose which we can reasonably ascribe to Congress. If we are not able to discover any other purpose—and I cannot imagine any other—then it follows necessarily that the language of § 1 is limited by § 8 to cases within "the designation or description" of the latter. Certainly we cannot suppose that Congress, even though its only purpose was to give a name to this act, intended it to include offenses which the name clearly excludes. If Congress intended to include in this act cases of naked immorality, without any element of commerce or coercion, then to call it the "White Slave Traffic Act" was a misnomer; and we can hardly assume

that Congress would take the trouble of formally bestowing a name upon a statute and then misname it.

But while § 8, if regarded only as giving a name to the statute, must confine the language of § 1 to cases within the "designation or description" of the name thus given, I think it does more than merely christen the law. Its form and its phraseology combine to denote an office more important than that, and its incorporation in the statute was such an extraordinary legislative procedure that we must attach a more than ordinary significance to it. When Congress said "that this Act shall be known and referred to as the 'White Slave Traffic Act,'" it meant, if it meant anything, that it should be understood and construed as an act for the suppression of the white slave trade. But we must understand the true import of those words before we can classify cases as within or without them. We cannot, of course, expect to find their definition in the older dictionaries, for the vicious practices which have introduced them into our language are of recent origin; but we do find, in a modern dictionary of accepted authority, definitions of a "white slave" and of "white slavery," in both of which the sale of young and innocent girls for immoral purposes is an essential element. Congress has not, however, used those words in a sense which restricts them to young girls; but it has used them in a sense which makes gain or restraint a necessary part of their definition, and that is made manifest by the report of the committee which prepared the bill and recommended its passage. This definition is authoritative, and controls the act.

Such is the view expressed by the Attorney General of the United States in an official communication to one of his subordinates; and by Mr. Justice Lamar in *United States* v. *Holte*, 236 U. S. 140, 146, in his dissenting opinion. We have a right to say that the meaning of the statute is, to say the least, so doubtful that this court ought to em-

ploy every known and approved method of ascertaining exactly what it means.

We are clearly within the rule which permits, and even requires, the court to take into consideration the results which must ensue, if that question be decided one way rather than the other. To hold that the act includes mere escapades transforms into a felony what all of the States have regarded as a misdemeanor for many years, and renders men infamous for conduct which, at its worst, might be no more than a transgression of the moral law. Our humanity revolts at the thought of punishing a moral lapse as a felony, and no law which does so can be properly enforced. The punishments provided in this statute when applied to cases of fornication or adultery may not be deemed cruel and unusual within the 8th Amendment, but they are so nearly such in fact as to engage the benevolence of judges, peace officers, and juries against its strict enforcement. It has long been a maxim with us that in order to insure the due enforcement of any statute its penalties must bear some fair relation to the offenses which it seeks to prevent, and we must assume that our federal lawmakers understood it.

We cannot suppose that those who drafted this law, or that those who enacted it upon a full consideration, could not foresee its consequences, and we must, therefore, suppose that the Congress of the United States knew that it was arming blackmailers, both male and female, with such an effective instrument as this act furnishes them, if construed to embrace mere escapades. It is a part of the history of our time that the Department of Justice is even now covering this Republic with a dragnet in an effort to apprehend those who have been preying upon the weaknesses and vices of men and women.

If the act must be construed to include cases of mere immorality, free from all element of commerce or coercion, then Congress had no constitutional power to enact it.

In each of the decisions which have heretofore sustained the constitutionality of the act, some element of commerce or coercion was involved. Much as we may abhor the idea that women are bought and sold, or transported from State to State for the purpose of hiring or exploiting them for immoral purposes, such a traffic is as much interstate commerce as the shipment of horses or cattle. In those cases the women were actually the subject of interstate commerce, and those who transported them were therefore within the regulatory power of Congress; but in this case the woman accompanied the man without any such purpose on his part, and she was not, therefore, the subject of interstate commerce. She was undoubtedly engaged in interstate commerce, and Congress could regulate her conduct so far as it related to or affected interstate commerce; but as she was not the subject of interstate commerce, Congress had no jurisdiction over any person simply because she traveled from California to Nevada. I do not forget that this court has said that persons may be the subject of interstate commerce, but that expression was used in declaring the power of Congress to regulate common carriers in the transportation of persons, or in declaring the power of Congress to regulate the conduct of persons engaged in interstate commerce; and in no case will it be found that this court has ever intimated that a person may, as to himself or herself, be the subject of interstate commerce. In the case of interstate travel the power of Congress is over the traveler, and not over any other person or thing; but in the case of an interstate shipment the power of Congress is over the subject-matter, as well as over the shipper. I think we may safely say that as every person passing from State to State has a right to go without molestation, insult, or injury, Congress could pass a law prohibiting affrays, or the use of obscene language, on any coach carrying interstate passengers; but beyond the safety and

CAMINETTI *v.* UNITED STATES.

DIGGS *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

HAYS *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 139, 163, 464. Argued November 13, 14, 1916.—Decided January 15, 1917.

The White Slave Traffic Act of June 25, 1910, c. 395, 36 Stat. 825, applies to any case in which a woman is transported in interstate commerce for the purpose of prostitution or concubinage; pecuniary

comfort of interstate passengers Congress cannot regulate the personal conduct of those who travel. The power is one over commerce, and is restrained by the very nature of it to commerce, in some substantial form.

How can a man violate an interstate commerce law when he does not travel himself, and does not send or receive anything from another State? It will not answer to say that he received the woman, because his interest in her was of that personal kind which is not reducible to commerce. The case would be entirely different if the woman whose transportation he had furnished was taken by him on the journey against her will or for the purpose of selling or exploiting her; for in that case she would be "the subject" of interstate commerce, and in transporting her from State to State he would be as much amenable to the commerce power of Congress as if he shipped a horse.

I will not insult the intelligence of the court by asking whether this law, if intended to apply to other than the real white slave traffic, is designed to regulate commerce or to regulate morals. If the law means that all immorality connected in any way with interstate transportation is within this act, then it is designed to regulate morals, not commerce; and if the Congress of the United States can, under the pretense of regulating commerce, take the morals of the people under federal control, it can, under the same pretense, gradually usurp the police powers of these States and finally destroy the States themselves.

Mr. Harry O. Glasser for petitioner in No. 464:

The word "prostitution" implies indiscriminate intercourse with men, *People* v. *Demousset*, 71 California, 611; *State* v. *Goodwin*, 33 Kansas, 538; *Carpenter* v. *People*, 8 Barbour (N. Y.), 603; *Van Dalsen* v. *Commonwealth*, 89 S. W. Rep. 255; *United States* v. *Smith*, 35 Fed. Rep. 490, and has been defined as involving the ideas of hire and

gain. *Munfill* v. *People*, 154 Illinois, 640; *State* v. *Gibson*, 111 Missouri, 97.

"Debauchery" signified originally an enticing away from employment or duty; later, a corruption of one's manners or morals, and as applied to women, merely seduction. *Koenig* v. *Nott*, 2 Hilt. (N. Y.) 323; Scott's Edition of Bailey's Dictionary (1755); McKenzie English Synonyms (London, 1854).

The words "other immoral practice" depend on the words preceding, embracing merely immoral acts which are analogous to prostitution and debauchery. As used in the statute, they apply to action which directly or indirectly involves gain. The true meaning is evidenced clearly by the definition of the act as the White Slave Traffic Act in § 8, which could have had no other purpose than to indicate the character of the offenses intended. All doubt on this subject is entirely removed by the report of the House Committee. Among other things the report makes very evident that the act was intended to combat an intolerable condition of affairs of recent origin due to modern transportation facilities. It could not, therefore, have been aimed at the practices of adultery and fornication.

Congress having no power to forbid these practices, the act must be construed within its power, that is, as relating to commerce or traffic in prostitutes. *United States* v. *Bitty*, 208 U. S. 393, related to an act passed to regulate the introduction of aliens into the country, which, as the court said, sought to keep out immigrants "whose permanent residence here would not be desirable, or for the common good." This was not necessarily based upon the commerce clause; the regulation of traffic and travel among citizens between different States is quite another thing, and so the intent of Congress in the alien act cannot be said to be the same as its intent in the White Slave Traffic Act, even though similar words are employed.

A definite evil was aimed at; not a general condition. *Holy Trinity Church* v. *United States*, 143 U. S. 457.

The conviction was not sustained by the indictment. The charges that the objects of the transactions complained of were prostitution and debauchery being in no respect made out, the conviction could only be sustained upon the charge that "other immoral practices" were in view. This allegation, merely following the generality of the statute, was insufficient. A conviction based on such a generality could not be pleaded against another indictment involving the same transaction.

The court should have warned the jury against the testimony of the woman as an accomplice, as requested by the petitioner.

That the woman transported is an accomplice, see *Holte* v. *United States*, 236 U. S. 140; *Reed* v. *State*, 63 Arkansas, 457; *People* v. *Collum*, 122 California, 186; *State* v. *Jones*, 115 Iowa, 113.

Mr. Assistant Attorney General Wallace for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

These three cases were argued together, and may be disposed of in a single opinion. In each of the cases there was a conviction and sentence for violation of the so-called White Slave Traffic Act of June 25, 1910, 36 Stat. 825, the judgments were affirmed by the Circuit Courts of Appeals, and writs of certiorari bring the cases here.

In the Caminetti case, the petitioner was indicted in the United States District Court for the Northern District of California, upon the sixth day of May, 1913, for alleged violations of the act. The indictment was in four counts, the first of which charged him with transporting and causing to be transported and aiding and assisting in

obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, in interstate commerce for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine. A verdict of not guilty was returned as to the other three counts of this indictment. As to the first count defendant was found guilty and sentenced to imprisonment for eighteen months and to pay a fine of $1,500.00. Upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, that judgment was affirmed. 220 Fed. Rep. 545.

Diggs was indicted at the same time as was Caminetti, upon six counts, with only four of which are we concerned, inasmuch as there was no verdict upon the last two. The first count charged the defendant with transporting and causing to be transported and aiding and assisting in obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his concubine and mistress. The second count charged him with a like offense as to another woman (the companion of Caminetti) in transportation, etc., from Sacramento to Reno that she might become the mistress and concubine of Caminetti. The third count charged him (Diggs) with procuring a ticket for the first mentioned woman from Sacramento to Reno in interstate commerce, with the intent that she should become his concubine and mistress. The fourth count made a like charge as to the girl companion of Caminetti. Upon trial and verdict of guilty on these four counts, he was sentenced to imprisonment for two years and to pay a fine of $2,000.00. As in the Caminetti case, that judgment was affirmed by the Circuit Court of Appeals. 220 Fed. Rep. 545.

In the Hays case, upon June 26th, 1914, an indictment

was returned in the United States District Court for the Western District of Oklahoma against Hays and another, charging violations of the act. The first count charged the said defendants with having, on March 17th, 1914, persuaded, induced, enticed and coerced a certain woman, unmarried and under the age of eighteen years, from Oklahoma City, Oklahoma, to the City of Wichita, Kansas, in interstate commerce and travel, for the purpose and with intent then and there to induce and coerce the said woman, and intending that she should be induced and coerced to engage in prostitution, debauchery and other immoral practices, and did then and there, in furtherance of such purposes, procure and furnish a railway ticket entitling her to passage over a line of railway, to wit, the Atchison, Topeka and Santa Fé Railway, and did then and there and thereby knowingly entice, and cause the said woman to go and to be carried and transported as a passenger in interstate commerce upon said line of railway. The second count charged that on the same date the defendants persuaded, induced, enticed and coerced the same woman to be transported from Oklahoma City to Wichita, Kansas, with the purpose and intent to induce and coerce her to engage in prostitution, debauchery and other immoral practices at and within the State of Kansas, and that they enticed her and caused her to go and be carried and transported as a passenger in interstate commerce from Oklahoma City, Oklahoma, to Wichita, Kansas, upon a line and route of a common carrier, to-wit, the Atchison, Topeka and Santa Fé Railway. Defendants were found guilty by a jury upon both counts, and Hays was sentenced to imprisonment for eighteen months. Upon writ of error to the Circuit Court of Appeals for the Eighth Circuit, judgment was affirmed. 231 Fed. Rep. 106.

It is contended that the act of Congress is intended to reach only "commercialized vice," or the traffic in women

for gain, and that the conduct for which the several petitioners were indicted and convicted, however reprehensible in morals, is not within the purview of the statute when properly construed in the light of its history and the purposes intended to be accomplished by its enactment. In none of the cases was it charged or proved that the transportation was for gain or for the purpose of furnishing women for prostitution for hire, and it is insisted that, such being the case, the acts charged and proved, upon which conviction was had, do not come within the statute.

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33; *United States* v. *Lexington Mill and Elevator Co.*, 232 U. S. 399, 409; *United States* v. *Bank*, 234 U. S. 245, 258.

Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton* v. *Rathbone*, 175 U. S. 414, 421. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for "any other immoral purpose," or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to

them. To cause a woman or girl to be transported for the purposes of debauchery, and for an immoral purpose, to-wit, becoming a concubine or mistress, for which Caminetti and Diggs were convicted; or to transport an unmarried woman, under eighteen years of age, with the intent to induce her to engage in prostitution, debauchery and other immoral practices, for which Hays was convicted, would seem by the very statement of the facts to embrace transportation for purposes denounced by the act, and therefore fairly within its meaning.

While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine from being the execution of purposes within the meaning of this law. To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations.

In *United States* v. *Bitty*, 208 U. S. 393, it was held that the act of Congress against the importation of alien women and girls for the purpose of prostitution "and any other immoral purpose" included the importation of an alien woman to live in concubinage with the person importing her. In that case this court said:

"All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution.' It refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family, as consisting in and springing from the union for life of one

man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.' *Murphy* v. *Ramsey*, 114 U. S. 15, 45. . . . Now the addition in the last statute of the words, 'or for any other immoral purpose,' after the word 'prostitution,' must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for purposes of 'prostitution.' In forbidding the importation of alien women 'for any other immoral purpose,' Congress evidently thought that there were purposes in connection with the importations of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words 'any other immoral purpose,' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis' Sutherland Stat. Const., § 423, and authorities cited. But that rule cannot avail the accused in this case; for, the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse."

This definition of an immoral purpose was given prior to the enactment of the act now under consideration, and

must be presumed to have been known to Congress when it enacted the law here involved. (See the sections of the act [1] set forth in the margin.)

[1] Sections 2, 3, and 4 of the act are as follows:

"Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished

But it is contended that though the words are so plain that they cannot be misapprehended when given their usual and ordinary interpretation, and although the sections in which they appear do not in terms limit the offense defined and punished to acts of "commercialized vice," or the furnishing or procuring of transportation of women for debauchery, prostitution or immoral practices for hire, such limited purpose is to be attributed to Congress and engrafted upon the act in view of the language of § 8 and the report which accompanied the law upon its introduction into and subsequent passage by the House of Representatives.

In this connection, it may be observed that while the title of an act cannot overcome the meaning of plain and unambiguous words used in its body, *United States* v. *Fisher*, 2 Cranch, 358, 386; *Goodlett* v. *Louisville and Nashville Railroad*, 122 U. S. 391, 408; *Patterson* v. *Bark Eudora*, 190 U. S. 169, 172; *Cornell* v. *Coyne*, 192 U. S. 418, 430; *Lapina* v. *Williams*, 232 U. S. 78, 92, the title of this act embraces the regulation of interstate commerce "by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes." It is true that

by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years, from any State or Territory or the District of Columbia, to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court."

§ 8 of the act provides that it shall be known and referred to as the "White-slave traffic Act," and the report accompanying the introduction of the same into the House of Representatives set forth the fact that a material portion of the legislation suggested was to meet conditions which had arisen in the past few years, and that the legislation was needed to put a stop to a villainous interstate and international traffic in women and girls. Still, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation, *Blake* v. *National Banks*, 23 Wall. 307, 319; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 42; *Chesapeake and Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 246; *Binns* v. *United States*, 194 U. S. 486, 495. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie* v. *Hare*, 239 U. S. 299, 308.

The fact, if it be so, that the act as it is written opens the door to blackmailing operations upon a large scale, is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately

addressed to the legislative branch of the government, which alone had authority to enact and may if it sees fit amend the law. *Lake County* v. *Rollins, supra*, p. 673.

It is further insisted that a different construction of the act than is to be gathered from reading it is necessary in order to save it from constitutional objections, fatal to its validity. The act has its constitutional sanction in the power of Congress over interstate commerce. The broad character of that authority was declared once for all in the judgment pronounced by this court, speaking by Chief Justice Marshall, in *Gibbons* v. *Odgen*, 9 Wheat. 1, and has since been steadily adhered to and applied to a variety of new conditions as they have arisen.

It may be conceded, for the purpose of the argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. But this act is not concerned with such instances. It seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited.

The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Moreover, this act has been sustained against objections affecting its constitutionality of the character now urged. *Hoke* v. *United States*, 227 U. S. 308; *Athanasaw* v. *United States*, 227 U. S. 326; *Wilson* v. *United States*, 232 U. S. 563. In the *Hoke Case*, the constitutional objections were given consideration and denied upon grounds fully stated in the opinion (pp. 308 *et seq.*). It is true that the particular case arose from a prosecution of one charged with

transporting a woman for the purposes of prostitution in violation of the act. But, holding as we do, that the purposes and practices for which the transportation in these cases was procured are equally within the denunciation of the act, what was said in the *Hoke Case* as to the power of Congress over the subject is as applicable now as it was then.

After reviewing the *Lottery Case*, 188 U. S. 321, 357, and other cases in this court decided since the decision of that case, it was said in the *Hoke Case* (p. 323):

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several States'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; Cooley, Constitutional Limitations, 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress."

Notwithstanding this disposition of the questions concerning the construction and constitutionality of the act, certain of the questions made are of sufficient gravity to require further consideration.

In the Diggs case, after referring to the fact that the defendant had taken the stand in his own behalf and that his testimony differed somewhat from that of the girls who had testified in the case, and instructing the jury that it was their province to ascertain the truth of the matter, the court further said: "After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with

which that trip was taken, contenting himself with merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness-stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness-stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

This instruction, it is contended, was error in that it permitted the jury to draw inferences against the accused from failure to explain incriminating circumstances when it was within his power to do so, and thus operated to his prejudice and virtually made him a witness against himself in derogation of rights secured by the Fifth Amendment to the Federal Constitution.

There is a difference of opinion expressed in the cases upon this subject, the Circuit Court of Appeals in the Eighth Circuit holding a contrary view, as also did the

Circuit Court of Appeals in the First Circuit. See *Balliet* v. *United States*, 129 Fed. Rep. 689; *Myrick* v. *United States*, 219 Fed. Rep. 1. We think the better reasoning supports the view sustained in the Court of Appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (Act of March 16, 1878, c. 37, 20 Stat. 30,) he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

The accused of all persons had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. The instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence must be read in connection with the statement made in this part of the charge which clearly shows that the court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances and intent with which that trip was taken, and the jury was told that it had a right to take into consideration that omission.

The court did not put upon the defendant the burden

of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf. We agree with the Circuit Court of Appeals that it was the privilege of the trial court to call the attention of the jury in such manner as it did to this omission of the accused when he took the stand in his own behalf.

See in this connection *Brown* v. *Walker*, 161 U. S. 591, 597; *Sawyer* v. *United States*, 202 U. S. 150, 165; *Powers* v. *United States*, 223 U. S. 303, 314.

It is urged as a further ground of reversal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the Circuit Court of Appeals that the requests in the form made should not have been given. In *Holmgren* v. *United States*, 217 U. S. 509, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 Bishop's Criminal Procedure, 2nd ed., § 1081, and cases cited in the note.

Much is said about the character of the testimony adduced and as to certain facts tending to establish the guilt or innocence of the accused. This court does not weigh the evidence in a proceeding of this character, and it is enough to say that there was substantial testimony tending to support the verdicts rendered in the trial

courts. Other objections are urged upon our attention, but we find in none of them a sufficient reason for reversing the judgments of the Circuit Courts of Appeals in these cases.

The judgment in each of the cases is

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of these cases.

MR. JUSTICE MCKENNA, with whom concurred the CHIEF JUSTICE and MR. JUSTICE CLARKE, dissenting.

Undoubtedly in the investigation of the meaning of a statute we resort first to its words, and when clear they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject-matter and the lexicons become our guides. But here, even, we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment. Let us apply these observations to the present case.

The transportation which is made unlawful is of a woman or girl "to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." Our present concern is with the words "any other immoral practice," which, it is asserted, have a special office. The words are clear enough as general descriptions; they fail in particular designation; they are class words, not specifications. Are they controlled by those which

precede them? If not, they are broader in generalization and include those that precede them, making them unnecessary and confusing. To what conclusion would this lead us? "Immoral" is a very comprehensive word. It means a dereliction of morals. In such sense it covers every form of vice, every form of conduct that is contrary to good order. It will hardly be contended that in this sweeping sense it is used in the statute. But if not used in such sense, to what is it limited and by what limited? If it be admitted that it is limited at all, that ends the imperative effect assigned to it in the opinion of the court. But not insisting quite on that, we ask again, By what is it limited? By its context, necessarily, and the purpose of the statute.

For the context I must refer to the statute; of the purpose of the statute Congress itself has given us illumination. It devotes a section to the declaration that the "Act shall be known and referred to as the 'White-slave traffic Act.'" And its prominence gives it prevalence in the construction of the statute. It cannot be pushed aside or subordinated by indefinite words in other sentences, limited even there by the context. It is a peremptory rule of construction that all parts of a statute must be taken into account in ascertaining its meaning, and it cannot be said that § 8 has no object. Even if it gives only a title to the act it has especial weight. *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, 82. But it gives more than a title; it makes distinctive the purpose of the statute. The designation "White-slave traffic" has the sufficiency of an axiom. If apprehended, there is no uncertainty as to the conduct it describes. It is commercialized vice, immoralities having a mercenary purpose, and this is confirmed by other circumstances.

The author of the bill was Mr. Mann, and in reporting it from the House Committee on Interstate and Foreign Commerce he declared for the Committee that it was not

the purpose of the bill to interfere with or usurp in any way the police power of the States, and further that it was not the intention of the bill to regulate prostitution or the places where prostitution or immorality was practiced, which were said to be matters wholly within the power of the States and over which the federal government had no jurisdiction. And further explaining the bill, it was said that the sections of the act had been "so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution." And again:

"The White Slave Trade. A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution." House Report No. 47, 61st Cong., 2d sess., pp. 9, 10.

In other words, it is vice as a business at which the law is directed, using interstate commerce as a facility to procure or distribute its victims.

In 1912 the sense of the Department of Justice was taken of the act in a case where a woman of 24 years went from Illinois, where she lived, to Minnesota at the solicitation and expense of a man. She was there met by him and engaged with him in immoral practices like those for which petitioners were convicted. The district attorney forwarded her statement to the Attorney General, with the comment that the element of traffic was absent from the

transaction and that therefore, in his opinion, it was not "within the spirit and intent of the Mann Act." [1] Replying, the Attorney General expressed his concurrence in the view of his subordinate.[2]

Of course, neither the declarations of the report of the Committee on Interstate Commerce of the House nor the opinion of the Attorney General are conclusive of the meaning of the law, but they are highly persuasive. The opinion was by one skilled in the rules and methods employed in the interpretation or construction of laws, and informed besides of the conditions to which the act was addressed. The report was by the committee charged with the duty of investigating the necessity for the act and to inform the House of the results of that investigation, both of evil and remedy. The report of the committee has, therefore, a higher quality than debates on the floor of the House. The representations of the latter may indeed be ascribed to the exaggerations of advocacy or opposition. The report of a committee is the execution of a duty and has the sanction of duty. There is a presumption, therefore, that the measure it recommends has the purpose it declares and will accomplish it as declared.

[1] "Careful consideration of the facts and circumstances as related by Miss Cox fails to convince me that her case came within the spirit and intent of the Mann act. The element of traffic is entirely absent from this transaction. It is not a case of prostitution or debauchery and the general words 'or other immoral practice' should be qualified by the particular preceding words and be read in the light of the rule of Ejusdem Generis. This view of the statute is the more reasonable when considered in connection with Section 8 where Congress employs the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practice connected with the degradation of women for gain."

[2] "I agree with your conclusion that the facts and circumstances set forth in your letter and its enclosure do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the federal courts unless other and different facts are presented to you."

This being the purpose, the words of the statute should be construed to execute it, and they may be so construed even if their literal meaning be otherwise. In *Holy Trinity Church* v. *United States*, 143 U. S. 457, there came to this court for construction an act of Congress which made it unlawful for any one in any of the United States "to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract or agreement . . . to perform labor or *service of any kind* [italics mine] in the United States, its Territories or the District of Columbia." The Trinity Church made a contract with one E. W. Warren, a resident of England, to remove to the City of New York and enter its service as rector and pastor. The church was proceeded against under the act and the Circuit Court held that it applied and rendered judgment accordingly. 36 Fed. Rep. 303.

It will be observed that the language of the statute is very comprehensive, fully as much so as the language of the act under review, having no limitation whatever from the context; and the Circuit Court, in submission to what the court considered its imperative quality, rendered judgment against the church. This court reversed the judgment, and, in an elaborate opinion by Mr. Justice Brewer, declared that "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." And the learned Justice further said: "This has been often asserted, and the reports are full of cases illustrating its application."

It is hardly necessary to say that the application of the rule does not depend upon the objects of the legislation, to be applied or not applied as it may exclude or include good things or bad things. Its principle is the simple one that the words of a statute will be extended or restricted to execute its purpose.

Another pertinent illustration of the rule is *Reiche* v. *Smythe*, 13 Wall. 162, in which the court declared that if at times it was its duty to regard the words of a statute, at times it was also its duty to disregard them, limit or extend them, in order to execute the purpose of the statute. And applying the principle, it decided that in a tariff act the provision that a duty should be imposed on horses, etc., and other *live animals* imported from foreign countries should not include canary birds, ignoring the classification of nature. And so again in *Silver* v. *Ladd*, 7 Wall. 219, where the benefit of the Oregon Donation Act was extended by making the words "single man" used in the statute mean an unmarried woman, disregarding a difference of genders clearly expressed in the law.

The rule that these cases illustrate is a valuable one and in varying degrees has daily practice. It not only rescues legislation from absurdity (so far the opinion of the court admits its application), but it often rescues it from invalidity, a useful result in our dual form of governments and conflicting jurisdictions. It is the dictate of common sense. Language, even when most masterfully used, may miss sufficiency and give room for dispute. Is it a wonder therefore, that when used in the haste of legislation, in view of conditions perhaps only partly seen or not seen at all, the consequences, it may be, beyond present foresight, it often becomes necessary to apply the rule? And it is a rule of prudence and highest sense. It rescues from crudities, excesses and deficiencies, making legislation adequate to its special purpose, rendering unnecessary repeated qualifications and leaving the simple and best exposition of a law the mischief it was intended to redress. Nor is this judicial legislation. It is seeking and enforcing the true sense of a law notwithstanding its imperfection or generality of expression.

There is much in the present case to tempt to a violation of the rule. Any measure that protects the purity of

women from assault or enticement to degradation finds an instant advocate in our best emotions; but the judicial function cannot yield to emotion—it must, with poise of mind, consider and decide. It should not shut its eyes to the facts of the world and assume not to know what everybody else knows. And everybody knows that there is a difference between the occasional immoralities of men and women and that systematized and mercenary immorality epitomized in the statute's graphic phrase "White-slave traffic." And it was such immorality that was in the legislative mind and not the other. The other is occasional, not habitual—inconspicuous—does not offensively obtrude upon public notice. Interstate commerce is not its instrument as it is of the other, nor is prostitution its object or its end. It may, indeed, in instances, find a convenience in crossing state lines, but this is its accident, not its aid.

There is danger in extending a statute beyond its purpose, even if justified by a strict adherence to its words. The purpose is studied, all effects measured, not left at random—one evil practice prevented, opportunity given to another. The present case warns against ascribing such improvidence to the statute under review. Blackmailers of both sexes have arisen, using the terrors of the construction now sanctioned by this court as a help—indeed, the means—for their brigandage. The result is grave and should give us pause. It certainly will not be denied that legal authority justifies the rejection of a construction which leads to mischievous consequences, if the statute be susceptible of another construction.

United States v. *Bitty*, 208 U. S. 393, is not in opposition. The statute passed upon was a prohibition against the importation of alien women or girls, a statute, therefore, of broader purpose than the one under review. Besides, the statute finally passed upon was an amendment to a prior statute and the words construed were an addition to the

prior statute and necessarily, therefore, had an added effect. The first statute prohibited the importation of any alien woman or girl into the United States "*for the purposes of prostitution.*" The second statute repeated the words and added "*or for any other immoral purpose*" (italics mine). Necessarily there was an enlargement of purpose, and besides the act was directed against the importation of foreign corruption and was construed accordingly. The case, therefore, does not contradict the rule; it is an example of it.

For these reasons I dissent from the opinion and judgment of the court, expressing no opinion of the other propositions in the cases.

I am authorized to say that the CHIEF JUSTICE and MR. JUSTICE CLARKE concur in this dissent.